THE LAWRENCE S. FLETCHER MEMORIAL FUND

STANFORD SCHOOL OF LAW

A TREATISE

UPON

THE CUSTOMARY LAW OF

Foreign Attachment,

AND

THE PRACTICE OF

THE MAYOR'S COURT OF THE CITY OF LONDON

THEREIN.

WITH FORMS OF PROCEDURE.

BY

WOODTHORPE BRANDON, Esq.

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

LONDON:

BUTTERWORTHS, 7, FLEET STREET,

Law Publishers to the Queen's most Excellent Majesty.

1861.

ARTHUR TAYLOR,
PRINTER TO THE HONOURABLE CITY OF LONDON.
M.DCCC.LXI.

TO

RUSSELL GURNEY, Esq., Q. C.

RECORDER OF LONDON,

THIS WORK IS DEDICATED

AS A MARK OF RESPECT.

PREFACE.

THE customary process of Foreign Attachment, as will be seen by the following treatise, is for the purpose of compelling the appearance of a debtor to an action at the suit of his creditor by a distraint upon his property, and, in default of such appearance, an application of the property towards the payment of the creditor's debt. The custom forms a very ready method of obtaining the payment of a debt without affecting the liberty of the subject, and is in strict accordance with the principle of modern legislation between debtor and creditor.

The legislature has adopted the principle of the custom, if not the letter of it, in the garnishee clauses of the Common Law Procedure Act 1854, but an attachment under that Act can only be obtained where the debt of the plaintiff has become a judgment debt, while a foreign attachment can be issued where the plaintiff's debt is merely a simple contract debt. Probably the attachments under the garnishee clauses may be considered as an experiment, but it must be perceived that the chances of a creditor obtaining his debt through this process are comparatively small, at least as regards finding property of the debtor, after such debtor has been com-

pelled to allow judgment to pass against him. The experiment appears however, so far as it has extended, to have been successful.

The custom has been the subject of inquiry under two Royal Commissions; in the year 1837 by the Commission to inquire into the municipal corporations in England, and in 1854 by the Commission appointed specially to inquire into the state of the Corporation of London. The Commissioners of 1837, in their Report, state that "a difference of opinion prevailed "in respect to the utility of the custom, but that the alleged "objections did not appear so formidable as represented, "while the advantage of a speedy and safe mode of recover-"ing debts was obvious." The Commissioners of 1854, in their Report, recommend "that the peculiar process of fo-"reign attachment should be continued, amending that cus-"tomary process in some particulars which appear to us to "require amendment."

The principal practical objections which have been urged against the custom are, 1. The difficulty which a garnishee experiences after he has paid a debt under an attachment, in discharging himself against his creditor, and the consequent risk of having to pay the amount a second time. 2. The cumbrous nature of the proceedings. 3. That the process is confined to the limits of the city.

The first, it must be admitted, was a subject of very serious difficulty, for certainly until lately very few cases are reported in which a defendant in a foreign attachment, who had brought an action against a garnishee in one of the superior

courts at Westminster, did not obtain the property notwithstanding that the garnishee had already paid the amount under the attachment. This does not arise from any defect in the custom, nor is it any argument against it, but the difficulty appears to arise from the extreme technicality which has been required in pleading a judgment recovered under an attachment, and also the matter of form with which the custom has been surrounded; but from whatever cause it may have arisen, great injustice has certainly at times been the effect.

The second objection is more to matters of form. The corporation have effected much improvement in the Mayor's Court, but with all their desire to improve the practice, nothing effectual can be done without the aid of Parliament.

The third is the objection chiefly urged against the custom; it cannot in truth be called an objection to the custom, but the expression of a desire that a law which prevails within the city should be made applicable to at least the other portions of the metropolis. The Commissioners of 1837, in their Report, state that "it cannot be expedient that the law upon "this subject within a small district should be different from "that which is the general law of the land, and the incon-"venience of such a difference must be greatly aggravated "when it exists between adjacent quarters of the same com-"mercial town."

It appears strange that this law should have been allowed to exist from time immemorial in a small portion only of the kingdom, for it is obvious that if such a law were good for the city of London it must be good for other cities, or at all events

for the whole of the metropolis. The custom is one of great commercial importance, as may be seen by the returns made of the amount of business transacted even within the limited jurisdiction of the Mayor's Court:

	1858.	1859.	1860.
Number of attachments issued .	602	590	737
Amount sworn to by plaintiffs sought to be recovered . . .	323,838*l.*	493,968*l.*	596,343*l.*
Recovered under judgment	3,722*l.*	6,108*l.*	14,005*l.*
Settled by parties out of court	135,528*l.*	193,272*l.*	109,676*l.*

It has been questioned whether the custom of foreign attachment applies to any debt not accruing within the limits of the city of London. This has arisen from a doubt whether the court out of which the process under the custom now issues is not what is usually termed an inferior court, and therefore unable to entertain any suit upon a cause of action arising out of its local jurisdiction; and, inasmuch as the process under the custom is only for the purpose of procuring an appearance of the defendant to an action in the court, if the court has no power to entertain the action, it cannot by consequence entertain the process under the custom.

The process issued by the Mayor's Court to compel the appearance of the debtor is generally termed a Foreign Attachment. Perhaps in strictness this should not be looked upon as the custom in its integrity, as the custom appears to have been that a citizen should have all his debts paid in

London, or else that his supposed debtors should appear there to disprove the debt demanded; and as no method existed for arresting a person when out of the jurisdiction of the local courts of the city, the custom directed an extent to be made of his property to compel him so to appear, and the process issued by the court was a process in distraint of the property for such purpose. If therefore a doubt exists respecting the jurisdiction of the court, the extent of the custom should rather be taken to show the jurisdiction than any supposed jurisdiction be taken as the limit of the custom; and, as there were not then or ever have been any other courts than the local courts having jurisdiction to issue this process, it must have been in these courts that the citizen exercised his right under the custom.

The privilege of a special legal jurisdiction has always been considered by the citizens as one of their most valuable immunities, and was secured to them in express terms by one of the laws of Edward the Confessor, and by the earliest of their charters which refer to any of their privileges in detail. The Court of the Portreve, now called the Mayor, must, prior to the Conquest, have been a court without a superior in the kingdom, save the Witenagemote, and as London is described by the laws of Edward the Confessor as the head of the kingdom and laws, perhaps it would not be too much to say that it was a court of judicature of the greatest consideration for the determination of ordinary civil contentions between subject and subject, and must at that period have held unlimited jurisdiction over all persons within the district of the city: this must have continued until the establishment of the *Aula Regis*, and, although it may then have lost rank, its jurisdic-

tion does not appear to have been in any way limited. Upon the destruction of the *Aula Regis* at the end of the Norman period and the establishment of the present superior courts, the Court of the Portreve became in terms still more an inferior court, but there exists no trace, from that period to the present, of any curtailment of its jurisdiction, neither is there a trace of any authority exercised over it by the newly-erected courts from the day of their creation until the year 1857, either in appeal or error; the jurisdiction appears to have existed perfectly independently of these tribunals, except so far as they exercised the right of the crown in prohibition, and in removing certain causes from out of that court into their own.

If the jurisdiction of this court has been diminished otherwise than as mentioned above, it is strange by what authority and at what period it has been effected, as the court existed under the laws and customs of London, which have from time to time been confirmed by Charter and Parliament, and non-use or even abuse are said not to effect such laws and customs. The subject of the jurisdiction of this court is under legal consideration, and any further inquiry may therefore at present be unadvisable. With respect, however, to Foreign Attachment, which may have an existence separate from the jurisdiction of the court, if the court had the limited jurisdiction now ascribed to it, allowing a defendant, after appearing on compulsion by the process of foreign attachment, to plead to the jurisdiction, the process being for the purpose of compelling a defendant to appear and interplead with the plaintiff, it seems hardly possible that our ancestors in creating this law could have invented such a transparent delusion;

indeed, we can hardly suppose that people, shrewd as the citizens always showed themselves, and from whose laws the legislature of the country are now borrowing—people who might be said to be creating their own laws without opposition, could be guilty of such a manifest absurdity.

The author has collected together all the materials that he could find relating to this custom, and has referred to all the published authorities applicable thereto; but it must be understood that in many instances the cases referred to are not to be taken as the authority for the text, but in connection therewith, the author being desirous not to omit any reported case. The terms plaintiff, defendant, and garnishee have been used, creating as it were imaginary attachments, but as there are three parties whose interests are to be considered, this method will be found more easy in elucidating the several positions.

CONTENTS.

Chapter VIII.

Chapter IX.

Chapter X.

Chapter XI.

Chapter XII.

Chapter XIII.

TABLE OF FORMS.

TABLE OF CASES.

THE

CUSTOMARY LAW OF ATTACHMENT.

CHAPTER I.

OF THE CUSTOM GENERALLY.

THE Laws of England are divided into two kinds; *viz.* the *Lex scripta*, the written law, and *Lex non scripta*, the unwritten law; and although all the laws of the kingdom have some memorials in writing concerning them, yet all of them have not their original in writing, in the manner or with the authority of Acts of Parliament. Some, the origin of which no trace exists, have grown into use and acquired their binding power and the force of laws by a long and immemorial usage; these form the *Lex non scripta*. Of these customary laws some are operative throughout the whole realm, whilst others are local and confined to some particular district.

The law or custom of Foreign Attachment is one of the latter description, and is applicable to the city of London and the liberties thereof. Similar customs prevail in Bristol [a], Exeter [b], Lancaster [c], Scotland, under the title of arrestment [d]; in France, under the title of *Saisie arret* [e]; in Jersey [f],

---

[a] *Bruce* v. *Wait*, 1 Scott, N. R. 81; S. C. 3 M. and W. 21.

[b] Isaac's Hist. of Exeter, part 2, p. 2; 1 Leon. 189, 264, 321; *Tross* v. *Michell*, Cro. Eliz. 172, pl. 13; Com. Dig. tit. Attachment, A.

[c] *Curl* v. *Elliott*, 2 Jur. 1089.

[d] Erskine's Law of Scotland, tit. Arrestment; *Selkrig* v. *Davies*, 2 Rose, 97. [e] Pothier, Traité de la Proced. Civil, art. Saisie arret.

[f] Exparte Dobree, 8 Ves. 82.

and in many maritime towns on the continent of Europe; and also in America g. As far as this realm is concerned this custom may be of precisely the same description, and subject to the same incidents, although distinct in some points; for the custom in the different localities did not all arise under one and the same grant or charter.

London at different periods purchased or extorted from the ruling powers, according to political influence or expediency, confirmation or grants of the various peculiar privileges and ancient laws which were at times seized by the monarch in order that they might be repurchased by the citizens, by a grant of imposts or subsidies, to enrich the royal exchequer. The same principle was adopted towards and by other cities, perhaps then of more comparative consequence than at present, and thus the grant of the custom may have been the same in principle but differing in its execution by the citizens themselves. One peculiarity exists in London relative to these laws; *viz.* that the mayor and aldermen for the time being are the depositories of the ancient laws and customs of the city, and whenever any of them are questioned the Mayor and Aldermen have to declare, by the mouth of the Recorder, what these laws and customs are.

The Charter of Edward IV. h to the city of London, after reciting that it is an ancient custom, continues—"it has been "allowed to the said city that the Mayor and Aldermen of the "said city for the time being ought to record all their ancient "customs by word of mouth, as often as and whenever any-"thing in action or plaint should happen or be moved before "any judges or justices whomsoever touching their customs "aforesaid, as in their claims in the last circuit of justices "holden at our Tower of London it is more fully contained; "we considering the same thing, being willing rather to en-

---

g *Gould* v. *Webb*, 24 L. J. Rep. (NS.) Q. B. 205; S. C. 4 E. and B. 933.
h Confirming Rich. II.

"large than diminish the custom of the said city, of our spe-
"cial grace have granted for us our heirs and successors unto
"the said mayor and commonalty and citizens and their suc-
"cessors, that whensoever any issue shall be taken on any
"plea of or upon the custom of the city of London, between
"any parties in pleading (even though they be themselves a
"party), or if anything in plea, action, or plaint, touching the
"said customs, be moved or happen before us or our heirs
"or successors, or our justices assigned to hold pleas before
"us or our heirs, or our justices of the Common Bench, the
"treasurer and barons of our Exchequer of us or our heirs,
"or before the barons of such like Exchequer only, or any
"other the justices of us or of our heirs whomsover, which
"shall exact or require inquisition, recognizance, certificate,
"or trial, the mayor and aldermen of the said city for the
"time being and their successors may record, testify, and
"declare whether such be a custom or not, by the Recorder
"of the same city for the time being, by word of mouth;
"and that upon such record, certificate, and declaration, the
"custom so alleged shall be allowed for a custom, or accounted
"not for a custom, without any jury therefore to be taken, or
"further process thereupon to be made."

This method of proving the custom is now judicially recognized by the superior courts[i], and until the custom has been so certified the superior courts will not recognize it. As far as it has been certified, it is said they will consider that portion as law[k]; but, inasmuch as the custom has never been certified in its integrity, the Recorder never having been required to certify more than may have been applicable to the particular case in which the custom has been questioned, it will be seen that the custom itself is necessarily much more

---

[i] Co. Litt. 74; Year-book, 21 Edw. IV. 74, 78; 22 Edw. IV. 30; 2 Inst. 126; 2 Roll. Ab. 579; Cro. Car. 516; *Plummer* v. *Benthall*, 1 Burr. 248. See Pulling's Laws, *&c.* of London, 10, 11.

[k] Mod. 212; *Blacquiere* v. *Hawkins*, 1 Doug. 378, 380; Andr. 304.

extensive than that which is contained in the certificates heretofore given.

There does not exist in the muniments of the corporation any record of the custom in a comprehensive form, and indeed it would be almost impossible that such should exist. We find, however, in *Liber Albus*[1] a statement of the principles of the custom, but the detail and practice relating to it must be sought in the recorded proceedings of the court, and in the reports of decisions of the superior courts, in cases involving questions upon the custom.

The citizens, by their laws, obtained a very prompt remedy against all debtors within their jurisdiction, whether they were citizens or persons merely sojourning within the city, for they were arrested and compelled to find sureties for their future appearance; but debtors not free of the city, and not within the jurisdiction, the citizens had no personal control over, and doubtless the law of Attachment was intended to operate chiefly against this class of persons, though it might incidentally also include citizens themselves. All persons not free of the city were called "Foreigners," or "Foreigners from the liberties of the city;" and hence the custom is called "Foreign Attachment," or "Attachment of foreigners' goods."

All the citizens were bound to reside within the city, and at times, when any were residing without the walls, precepts were issued directing them to come within, or in default they were to be "taken as foreigners." Part of the citizen's oath was "to be obedient to the mayor and ministers of the city," probably therefore anyone not appearing on the summons of

---

[1] *Liber Albus* is a book in the custody of the Town Clerk of London, and was compiled according to the proœmium in the year 1419, by John Carpenter, the then Town Clerk. It is a compilation of the laws, customs, and usages of the citizens. It has been published under the direction of the Master of the Rolls, and forms Vol. I. of the *Munimenta Gildhallæ Londoniensis*. See *post*, Appendix.

the serjeant was considered as a "Foreigner from the liberties of the city," and therefore liable to the custom; or even if a citizen, he may have lost his privilege by his default, the custom would therefore be a general custom against all.

Foreign Attachment formed one of the many customary laws founded by the citizens, and confirmed to them by charter, in furtherance of one of the principles of their civil administration, that they should not be compelled to plead without the walls of the city; and one of these charters grants "that "all debtors which do owe debts to the citizens of London "shall pay them in London, or else discharge themselves in "London, that they owe none." To such an extent did the citizens carry this principle, that if a person owed money to a citizen, and neither the debtor nor any property belonging to him could be found in London, but the citizen could find property in London belonging to some other person resident within a town wherein he knew his debtor to be, such citizen might attach the property so found in London, although not his debtor's, in order to compel the governing body of the town wherein such debtor was to enforce the appearance of the debtor in London, to answer the demand of such citizen. The creditor, in order to obtain payment of his debt, entered a complaint or proceeding against the debtor in either the Mayor's or Sheriffs' Courts. The creditor then, to compel his appearance, prayed process against him; that is, asked the court to have him summoned to appear in court, to answer the complaint: this the court granted, and commanded the serjeant[m] to summon the debtor to appear in court, to answer as requested; and the serjeant was directed afterwards to state to the court what he had done in pursuance of this order.

This summons or calling of the defendant was orally made, and in early times was, without doubt, a substantive summons

---

[m] The Serjeants were officers attached to each court, and termed indiscriminately Ministers or Serjeants.

and bidding of the debtor to appear in court, and by some supposed to have been at London Stone.

If the defendant did not answer to the summons or calling of the serjeant, the serjeant made his statement or return to the court that the defendant was not to be found within the city, and thereupon, in open court, the debtor was "solemnly called," and if he did not then appear, he was considered in default.

If upon the default spoken of being recorded, the creditor knew of any person holding property of his debtor, he could then allege to the court that such person owed money, or held property belonging to his debtor, and then pray process, to, what is technically termed, "attach the debtor" thereby, that is, to place an embargo upon his property to compel him to appear in court and answer the complaint. This process the court granted, which was a direction to the serjeant to warn the person holding the property not to part with it without the further order of the court. The court then, in the same manner as on the first process, directed the serjeant to make a return at a future day of what he had done under such direction, and upon the return of the serjeant in open court that he had "attached the defendant" by the property, the defendant was again called, which was no doubt, as that before spoken of, an actual calling. If the defendant did not answer, this default was recorded and termed a first default, and a second, third, and fourth day was named for the defendant's appearance, and each day he was called, and the default recorded.

If the debtor appeared in court on any day upon which he had been called he was in the same position as if he had been arrested in an ordinary action; he was "delivered to manucaptors," in other words he was compelled to find bail for his future appearance.

At the court on which the fourth default was recorded the creditor was allowed to proceed with the attachment, and to

summon the person holding the property to show cause why the creditor should not have it, in extinguishment, or if the amount was insufficient, in part extinguishment of his debt. At the time specified in the summons it is probable that in former times the garnishee appeared and orally answered, and up to the time of this answer all property coming to his hands was subject to the attachment.

There is, according to the present practice, no personal appearance, although there is a notice of an appearance having been entered in the office of the court, and it is eventually, when the record is made up, entered thereon *pro forma*, as having taken place; but it is necessary that a plea should be delivered, which plea is in effect the answer which the garnishee in former times orally gave, and upon which the case was adjudged. The proceedings in the present day are not of so summary a character, and instead of being oral are now reduced to writing, and the callings before spoken of, as occurring in reality, have in modern practice become mere fictions,—all however are inserted upon the record.

It will be seen by the foregoing description of the custom, that the process of Foreign Attachment is not an original proceeding, but that it is merely ancillary to other proceedings, the essence of its principle being to place an embargo on any property of a debtor, to ensure his appearance to answer the creditor's claim, and in default of such appearance to take the property or part of it in satisfaction or part satisfaction of the creditor's debt.

Although an attachment is in many respects guided by the principles of the common law, yet it is not to be considered strictly a proceeding at law in the legal sense, but rather in the nature of a proceeding in equity, granting an injunction against any particular person parting with the property of an absent debtor in order to compel his appearance, and, in default of his appearance, an adjudication of the property towards the liquidation of his creditor's demand.

An attachment applies only to property, and is not considered equivalent to an arrest [n].

The custom is not confined to the attachment of property of persons who are out of the city, but it may be put in force against any person, without reference to his place of abode; neither is it confined to citizens, freemen, or even Englishmen; all persons are subject to it, or are entitled to call it in aid, whatever may be their residence [o]; but the person holding the property must be within the city at the time of the service of the process of attachment upon him, to give the city court jurisdiction.

The proceedings are now commenced by an action or plaint of debt being entered against the defendant in the method of ordinary actions of debt [p]. The record, which is a history of the proceedings, and supposed to be engrossed at the time the circumstances stated occur, being stated in the present tense, after reciting the entry of the action, continues "and the plain-"tiff prays process against the defendant," which the court grants, commanding the serjeant-at-mace "that he, according "to the custom of the said city, summon by good summoners "the said defendant to appear here in court, to answer the "plaintiff in the plea aforesaid [q]," and at the same court the serjeant returns and certifies to the said court, according to the custom of the city, that the defendant "has nothing "within the said city or liberties thereof whereby he can be "summoned [r], nor is he to be found within the same;" whereupon the defendant "being solemnly called does not "appear, but makes default." In the present day the prayer

---

[n] *Wood* v. *Thompson*, 5 Taunt. 850; S. C. 1 Marshall, 395; *Bromley* v. *Peck*, 5 Taunt. 851; *Day* v. *Paupiere*, 18 L. J. Rep. (NS.) Q. B. 270; S. C. 7 D. and L. 12; 14 Jurist, 40.

[o] *Harrington* v. *McMorris*, 5 Taunt. 227; S.C. 1 Marshall, 33.

[p] Bohun, 254. See cap. iv., Of Making the Attachment. [q] *Ibid.*

[r] Com. Dig. tit. Att. A. 22 Edw. IV. 30; Starkey's Certificate, see Appendix.

of the plaintiff to the court, the grant of process, the serjeant's return thereto, and the default of the defendant, do not take place, but it is necessary that they should be stated on the record before an attachment is granted; because, without some default no attachment will lie, and the omission would be fatal on error[s].

Upon the return of the serjeant, and the default of the defendant being recorded, the record continues "that the plain-"tiff alleges to the court that A. B. owes money to the defen-"dant, *&c.*, or has goods, *&c.* belonging to the defendant in "his custody, and prays process, according to the custom of "the said city, to attach the defendant by the said money or "goods so in the hands and custody, *&c.* of A. B., that the de-"fendant may appear in the court to answer the plaintiff in "the plea aforesaid;" which the court grants, and the serjeant is commanded that he attach the said defendant by the said (money or goods) so in the hands and custody of A. B., "and "the same in his hands and custody defend and keep, so that "the defendant may appear in the court to be holden," *&c.*, "to answer the plaintiff in the plea aforesaid."

All this is recited in the Record as occurring at one and the same court; no specific time is necessary to elapse, but immediately the action is entered, and the plaintiff makes a satisfactory affidavit of his debt, he is at liberty to issue the attachment. This attachment is the command of the court to the serjeant to attach the defendant by the monies or goods belonging to him, as before spoken of. This attachment, although by custom *ore tenus*[t], is not now left to so much uncertainty, for the serjeant serves upon the holder of the defendant's money or goods a notice directed to him, stating that by virtue of the action, *&c.* he attaches "all such monies, goods, "and effects as you now have, or which shall hereafter come

---

[s] See cap. iv., Of Making the Attachment, *&c.*

[t] Writ and Return, see Appendix.

"into your hands or custody, of the said defendant, to answer "the said plaintiff in the plea aforesaid; and that you are "not to part with such monies, goods, and effects without "licence of the said court [u]." Immediately upon the service of this notice upon the holder of the property (who is thenceforth called the Garnishee, from *garnir* to warn), the attachment takes effect, and all the property then in his hands, whether goods or money, or both, becomes liable under the custom, as well as all property of the defendant's coming into his hands, or money received by him for the defendant, or money which may become due from him to the defendant up to the time of his pleading [x], and no act either of the garnishee or defendant subsequent to the attachment can affect the position of the plaintiff in relation to the property attached. Although the notice of the garnishee imperatively warns him not to part with the property of the defendant without the leave of the court, yet in the case of perishable goods this is somewhat relaxed; as also where the goods are of that nature that by too strict an adherence to the notice a market might be lost, and by such loss of market the goods become of less value, or be deteriorated by keeping, therefore it is left to the discretion of the garnishee in such cases, and he may sell the property, the value being ascertained by a proceeding called an *Elongavit* [y].

Immediately an attachment is made the property attached becomes *in custodia legis*, for although an attachment without any further proceedings thereon is merely in the nature of an inchoate lien, yet when perfected by judgment and execution the proceedings relate back to the date of the attachment made, and it becomes a specific charge upon the property; therefore goods attached cannot be taken in execution

---

u See cap. iv., Of Making the Attachment, *&c.*

x Bohun, 261; Com. Dig. tit. Att. C.; 1 Roll. Ab. 553, fol. 25; Ashley, 57; *McDaniel* v. *Hughes*, 3 East, 367.

y See cap. ix., Of the *Elongavit*.

by *Fi. fa.* except subject to the attachment [z]. Neither can the owner of a chattel recover it out of the hands of the holder if attached, although it has been attached not as the property of the owner, but of some third person; as where a chaise was hired by A. and placed by him at livery with B., and while in B.'s custody attached by a creditor of A.'s, a demand by the owner, and refusal to deliver by B. on account of the attachment, was held not to constitute a conversion upon which the owner might maintain trover against B., the chaise being *in custodia legis* [a]. And where an attachment was made in the Mayor's Court on a debt, and subsequently an attachment was made under the provisions of the Common Law Procedure Act, 1854, on the same debt, and an application was made for the second attachment to have precedence, as it was a final proceeding and the proceeding in the Mayor's Court was only an inchoate lien, it was refused, although the plaintiff in the Mayor's Court had committed laches, on the ground that the Mayor's Court had taken cognizance of the debt, and it was *in custodia legis*. Nor will an action brought for the same money by the defendant in the attachment against the garnishee after the attachment made annul such attachment, but the garnishee may, provided judgment and execution has been obtained against him in the attachment, plead it at any time *puis darrein continuance* [b].

Upon the attachment being made the plaintiff becomes in the position of the defendant towards the garnishee, and the service of the attachment is as a demand upon the garnishee, or as a suit against him by the defendant for the property in his possession, and gives to the plaintiff in pursuing the attachment the same rights against the garnishee which the defendant had; and the same answer that the garnishee

---

[z] Roll. Ab. 893; Execution B. 1.

[a] *Verrall* v. *Robinson*, 2 C. M. and R. 495; S. C. 4 Dowl. 242; S. C. 5 Tyr. 1069; S. C. 1 Gale, 244. See *Mallilieu* v. *Laugher*, 3 C. and P.

[b] See cap. xii., Of Pleading an Attachment. [551.

could give to the defendant if sued by him can be given to the plaintiff under the attachment. Therefore, where a stoppage *in transitu* is good against the defendant it is good against the plaintiff, and it is not defeated by an attachment laid upon the goods by a creditor of the defendant, neither will an attachment vary any contract between garnishee and defendant, so as, for instance, to seize freight before the goods are delivered and the freight thereupon demandable; neither will it override any assignment for a valuable consideration made by a defendant of his property in the garnishee's hands before attachment made with notice; nor in the same way will it override a legal or an equitable lien accruing before the attachment.

All property that comes to the hands of the garnishee at any time after the attachment, up to plea, as well as the property in his hands at the time of the attachment, is liable, and not the mere maximum of amount that may at any time happen to be in his hands, as where he may have parted with some monies prior to the receipt of others; as if the garnishee have at the time of the attachment 100*l.* and pay away 50*l.*, but receive again another 100*l.*, although at no time did he hold more than 150*l.* together in his hands belonging to the defendant, yet as he was not warranted in parting with the 50*l.* he is liable for the whole 200*l.*

There is no necessity for the garnishee or for any one else to give notice to the defendant of any of the proceedings in the attachment; it is advisable, however, for him to do so to prevent any suspicion of collusion, and also as a matter of fairness to the defendant, to allow him time to take measures to dispute or settle the plaintiff's debt [c].

Upon the service of the attachment, the serjeant at the next court—that is, the following day,—makes his return, that on a certain day, *&c.* he had attached the defendant by

---

[c] See *post*, as to second attachment on same action.

&c.; and the record then states that on the day named the plaintiff appeared, and the defendant was called but did not appear, but made default, which default is recorded against him, and a further day, *viz.* the following day, is given to the parties, when the same allegation is recorded, and so the like on two following days, making four defaults recorded against the defendant. On the same court-day whereon the last of the four defaults is recorded against the defendant, the record alleges that the plaintiff "prays process, according "to the custom, *&c.* to warn the garnishee to appear in this "court, to show cause," *&c.*, whereupon "it is commanded by "the court to the said serjeant-at-mace, that he according to "the custom of the city, warn and make known to the said "garnishee to be and appear here in this court to be holden," *&c.* "to show cause why the plaintiff should not have execu-"tion of the said (goods or money, *&c.*) so attached," *&c.* This is all entered upon the record; no appearing or calling takes place, but on the day of the fourth or last default the plaintiff is at liberty to issue a *Scire facias*, which is a warning to the garnishee to appear at a future court to show cause as mentioned. This *Sci. fa.* describes the property for which the plaintiff proceeds, and the garnishee either appears or allows judgment to go against him by default[d]; but he must exercise good faith towards the defendant, and must not be guilty of collusion against the interests of a third party, or the judgment against him will not hold him discharged of the amount paid under it[e]. Nevertheless there is no reason why the garnishee should appear if no doubt exists as to the property belonging to the defendant and the garnishee has no notice of its being protected, or any right over it being in any other person than the defendant, as in such cases a judgment by default is as good a defence on behalf of the garnishee

---

[d] See cap. viii., Of the Judgment by Default;—if goods, *vide* Judgment of Appraisement.

[e] *Westoby* v. *Day*, 22 L.J. Rep. (NS.) Q.B. 418; S.C. 2 E. and B. 605.

against any claim of the defendant as a verdict. If however any reason exist why the garnishee should not let judgment go by default, or should not appear and admit the property in his hands, then he should appear in the ordinary method on the return of the *Sci. fa.*, and the issue then lies between the plaintiff and himself as to the property in his hands belonging to the defendant, subject to the attachment, the proof of which lies upon the plaintiff.

After the garnishee has appeared the plaintiff may proceed[f] in his attachment by demanding a plea; but before he do so he should ascertain if possible the exact position of the property in the hands of the garnishee, because immediately the garnishee pleads the prospective effect of the attachment ceases, and all property coming to his hands after the date of the plea is unaffected by the attachment. It therefore is sometimes to the benefit of the plaintiff to delay his proceedings; for instance, in case it is supposed the garnishee has not sufficient in his hands to pay the plaintiff's claim, and a greater amount of property is expected to come to the garnishee's possession; on the other hand, it is at times his interest to proceed as speedily as possible; for example, where bankruptcy is feared, or other attachments are already made upon the same property. This must, however, always depend upon the circumstances of each case; and it must be borne in mind that where a plaintiff in a first attachment commits laches in his proceedings, and allows a second or subsequent attachment to obtain priority of trial over the first attachment, the first forms no lien on the fund as against the second or subsequent attachment so obtaining priority of trial; but should he so lose his priority it will not affect his proceedings in any other respect, as the action when once entered, and the attachment made thereon, continue in force for ever, although no further proceedings are taken upon

---

[f] See cap. iv., Of Making the Attachment, *&c.*

them g. Neither will the plaintiff in the first attachment lose his priority against any other one, if he have not committed laches against that one, as the laches must be some specific laches against each individual attachment to give such individual attachment priority over the first; but this priority in a subsequent attachment must not be obtained by collusion of any of the parties. Thus, if two attachments are made in the hands of the same garnishee and on the same property, and the trial of the first is delayed by a bill of proof h filed, and the second is tried before the first, there are no laches in the first attachment, as the plaintiff has not delayed his trial, except by proceedings he could not control; and in such case the first attachment will stand as a lien on the fund, and the plaintiff in the second attachment can only have judgment for the balance over and above the amount of the first attachment. So if the same garnishee in the second attachment appear in the second attachment on service of the attachment paper only, that is without being served with the *Sci. fa.*, and keep out of the way to avoid service of the *Sci. fa.* in the first, and thus allow the plaintiff in the second to obtain priority of trial, this will not avail the plaintiff in the second attachment, if the plaintiff in the first has not committed laches in issuing his *Sci. fa.*, as the serjeant would then have the *Sci. fa.* in the first attachment for service at the time the second is supposed to issue; and in making up the record in the second attachment the service of the *Sci. fa.* by the serjeant is recited, and the serjeant being bound to serve all such proceedings by priority as they are handed to him, the *Sci. fa.* in the first would have been served with or before the *Sci. fa.* in the second if the garnishee had not appeared on the service of the attachment paper in the second, and thereby rendered the service of the *Sci. fa.* in the second unnecessary, the appearance before the return of the *Sci. fa.* being a mere convenience. The same

---

g Boh. 254; Com. Dig. tit. Att. A. h See cap. x., Of the Bill of Proof.

rule is applicable where judgment by default of appearance of the garnishee is signed in the second attachment and an appearance entered for him in the first; for although the plaintiff in the second attachment obtain priority of judgment, yet the first attachment is a lien on the property in the garnishee's hands, and any payment made by force of the judgment under the second will be no answer to the first.

In the proceedings on the attachment between the plaintiff and the garnishee, the validity of the plaintiff's claim against the defendant does not come in issue, for the garnishee cannot dispute such demand[i]. This works no hardship on the defendant, for he is fully protected by the oath of the plaintiff, and the pledges given by the plaintiff before he obtains the property[k] to restore to the defendant the money attached, should the defendant afterwards disprove the plaintiff's demand.

The issue between the plaintiff and the garnishee as to the possession of the property is very broad indeed, for the plaintiff by the *Sci. fa.* summons the garnishee to show cause why he should not have execution of the property, *&c.* so attached. To this the garnishee usually pleads *Nil habet*, that he at the time of the attachment "neither had nor detained, nor "has he now, nor does he now detain," *&c.*; and under this plea he may show not only that he has no property, but that if he has that it is protected from the effect of an attachment by suit in another court, or that the property is assigned, or any other cause why the plaintiff should not have execution as prayed[l].

If upon the trial the garnishee obtain a verdict, it is entered upon the record and the attachment is dissolved, the parties being placed in precisely the same position they occupied prior to the attachment being made. If the plaintiff obtain a

---

[i] See cap. iii., Of the Plaintiff's debt and affidavit; and cap. v., Of the Garnishee's appearance and plea. [k] See cap. iv., Pledges to restore.

[l] See cap. v., Of the Appearance of the Garnishee, and his plea.

verdict he enters up his judgment[m], and before he can obtain execution he must find "two pledges to restore[n];" that is, two responsible persons who undertake on the part of the plaintiff that, if the defendant come into court within a year and a day and disprove or avoid the plaintiff's debt or any part thereof, the plaintiff shall restore to the defendant the whole or such part of the money attached as shall equal the amount of the plaintiff's claim which the defendant may have disproved or avoided, or that they the pledges will do it for him. This is for the protection of the defendant against any fraudulent claim of the plaintiff, although substantiated by oath; and the year and a day is given to the defendant to take proceedings for disputing any claim of a plaintiff so made.

After the pledges are found execution issues, and must be executed, to make it a compulsory payment by the garnishee, in order that it may be available for him on any claim made against him by the defendant. The money is received of the garnishee by the serjeant-at-mace and paid into court, and subsequently paid over to the plaintiff, upon his acknowledging satisfaction of so much on the record.

With the entry of the acknowledgement of satisfaction the proceedings in the attachment may be said to close, as this entry stops the defendant's power to dissolve the attachment. At any time, however, before this entry is made, the defendant can appear to the action and dissolve the attachment[o], and immediately upon the appearance being perfected he may compel the plaintiff to proceed by demanding a declaration, as in ordinary actions.

After execution has issued and the garnishee has paid under it, he may plead the attachment in bar[p] to any action brought by the defendant against him for the same property; for now

---

[m] See cap. iv., Of Making the Attachment. [n] *Ibid.* Pledges to restore.
[o] See cap. vi., Appearance of the Defendant.
[p] See cap. xii., Of Pleading an Attachment.

it is a well-established rule, that a payment under a regular judgment and execution of a court of competent jurisdiction is a good defence, in the absence of fraud, to any action brought by the defendant against the garnishee for the same property.

After the entry of satisfaction on the record the only method the defendant has of appearing to the original action is by writ of *Scire facias ad disprobandum debitum*[q], which must be brought within a year and a day. This writ is brought by the defendant to revive the proceedings and to cause the plaintiff to prove his debt, so that if a plaintiff on a fictitious debt, under colour of an attachment, have obtained the money of the defendant he may be compelled to make restitution.

Sometimes property in the garnishee's hands, not belonging to the defendant, is attached as his property, and although this might be a good defence to the attachment under the plea of *nil habet*, yet a variety of circumstances may exist which may render it advisable for the true owner to claim the property by a substantive claim on his part; this is done by what is called a Bill of Proof, a proceeding in the nature of a petition to the court to be allowed to prove the property attached to be the property of the petitioner[r].

If the attachment during any stage of the proceedings cause a settlement between the plaintiff and defendant, and the plaintiff obtain full satisfaction of his demand, then he is bound formally to withdraw the attachment, or he may be compelled to do so; but if he obtain only a part of his demand, or if he obtain the full amount of money in the garnishee's hands in one attachment and it is less than his demand, or from any other cause he is desirous of withdrawing one attachment of several, he may do so, or he may withdraw all the attachments and yet leave the action; but if he withdraw the action, all the attachments made thereon and all the proceedings are withdrawn with it.

---

[q] See cap. vi., Appearance of Defendant. [r] See cap. x., Bill of Proof.

Upon one action and affidavit the plaintiff may make as many attachments as he pleases against the property of the defendant in the hands of different garnishees at the same time, even though the money in each garnishee's hands may be respectively supposed to be sufficient to cover the plaintiff's claim. The plaintiff cannot however recover from the garnishee, under any one or more attachments, a greater amount of money or value in goods in the aggregate than that specified as being due from the defendant to the plaintiff in the affidavit of debt, and for the purposes of the attachment the amount there specified is taken as the total demand of the plaintiff; therefore, although the garnishee is warned not to part with any property of the defendant after the service of the attachment, yet, with respect to money, it is not necessary for a garnishee to retain in his hands more than the amount sworn to by the plaintiff; he may therefore adopt a course believed to be general amongst bankers, to debit the defendant's account the amount sworn to in the attachment, as if the defendant had drawn a cheque for that sum, leaving the balance still applicable for the purposes of the defendant. With respect to goods this plan cannot be adopted, as the garnishee cannot tell what particular goods the plaintiff will charge him with the possession of, but the garnishee may compel the plaintiff to proceed in the attachment as far as the *Scire facias*, and ascertain thereby with what he is charged, and all the property not included therein he may still hold to the order of the defendant. The plaintiff may, after the day of making the first attachment, make other attachments on the same action and affidavit; but in such case it must be upon application of the plaintiff or his attorney, in writing, stating that no recovery or an insufficient recovery had taken place under the first attachment; but sometimes this is not sufficient, and the Registrar will require a fresh affidavit of the debt being still due, especially if any length of time has elapsed after making the first attachment; a like affidavit is also

sometimes required when the judgment is signed upon an attachment made some length of time previously.

A plaintiff is not debarred from making an attachment on the property of the defendant by reason of his having previously brought an action against the defendant in a superior or other court for the same debt[s], nor is he debarred from taking other proceedings for the recovery of his debt[t] by reason of his having made an attachment; and where proceedings have been brought in a superior court, as well as an attachment made for the recovery of the same debt, the Mayor's Court will not entertain any application, either by the garnishee or defendant, to compel a plaintiff to elect in which court he will proceed, unless the defendant shall have appeared in the Mayor's Court and dissolved the attachment; nor will the courts at Westminster entertain any application to stay proceedings in any action there on account of any prior proceeding in the Mayor's Court[u], unless they are improperly or vexatiously carried on. The proceedings in attachment being equitable proceedings in the discretion of the court, the court will at all times hear applications respecting matters which may prejudice any party to the record and make orders summarily for his relief, but not usually where the same end may be obtained by the ordinary practice; and at times the court will entertain applications such as to compel the plaintiff to proceed, even at the instance of a stranger to the record, when injustice may be done by the attachment; but in such cases only where there has been great delay on the part of the plaintiff, or where there is evident collusion or fraud.

In ordinary proceedings in attachments no costs are now allowed on either side[v]; this, without some inquiry, appears

---

[s] *Leuknor* v. *Huntley*, Cro. Eliz. 593, 713. [pl. 76.

[t] Com. Dig. Att. B.; *Roberthon* v. *Norroy King at Arms*, 1 Dyer, 83,

[u] *Denton* v. *Maitland*, 15 L.J. Rep. (NS.) Q.B. 332; S.C. 11 Jurist, 42; *Smidt* v. *Ogle*, 6 Taunt. 74. [Bohun, 257.

[v] *Tross* v. *Michell*, Cro. Eliz. 172; S.C. 1 Leon. 321; Com. Dig. Att. G.;

to be a great hardship and calculated to work injustice; but in reality it is not so, for if costs were allowed to attend the result it would be a very serious objection to the whole custom. If a plaintiff could recover his costs in attachment from out the fund, it might lead to collusion between plaintiff and garnishee to swell the costs, the garnishee having money of the defendant's in his hands to pay them. If the plaintiff had his costs the garnishee would also be entitled to his, and costs on both sides would then fall upon the defendant, and yet not a shadow of defence to the attachment might exist. The plaintiff could not fairly have his from the garnishee, as the garnishee might not have any property of the defendant in his hands; the garnishee could not have his of the plaintiff, or he might compel the plaintiff to go to trial in cases where no doubt existed. It is for the purpose of preventing frivolous attachments that plaintiffs are not allowed their costs, and to prevent garnishees raising frivolous defences that they are not allowed to them; it will readily be seen that endless might be the collusion if costs were allowed to abide the event in ordinary issues in attachment. This, in all probability, is the reason why costs have not been given, and that which was originally a matter of practice is now considered a portion of the custom; but it is presumed the court has power to grant costs, in the ordinary issues in attachment, although it does not now exercise it, as it awards them in matters collateral to the attachment, and there appears no reason to draw a distinction between ordinary issues and matters collateral, but they are in the discretion of the court.

It has been seen that if a defendant, upon an attachment being made, pay the plaintiff his debt, the plaintiff is bound to give a withdrawal of the attachment; the expense of the attachment the plaintiff cannot claim, but he is entitled to the costs of the action entered against the defendant upon which the attachment is founded; and where the defendant has perfected bail, or rendered his body to prison, or paid money

into court in dissolution of the attachment, inasmuch as the attachment is thereby rendered void, and the proceedings thenceforth are continued upon the original plaint, from the time of the dissolution, either the plaintiff or defendant is entitled to his costs as in an ordinary issue, so also in proceedings under a writ of *Scire facias ad disprobandum debitum*, after the appearance of the defendant.

The Mayor's Court alone has the power of trying the issue in the attachment[w], but the garnishee or defendant may bring a *Certiorari* to remove the proceedings; and on the return of the writ may put in bail on the *Certiorari* in the superior court, or pay the money into such court, and the attachment then becomes dissolved; but if the money is not paid into such court, or bail given, the plaintiff is entitled to issue a *Procedendo*[x].

If an attachment be made of property in the garnishee's hands, and he is desirous of getting rid of it, or if he believes proceedings may be taken against him for the same property by the defendant, he should force on the plaintiff either to proceed to judgment and execution or else to abandon his attachment, because an attachment alone cannot be pleaded as a good defence by a garnishee in an action brought against him for the same property by the defendant, but a judgment and execution executed can be pleaded in bar[y]; and where, after an attachment made, an action was brought by the defendant against the garnishee in a superior court, the court in which the action had been brought refused an applica-

---

w By the 47th section of the Mayor's Court of London Procedure Act, 1857, any judge of a superior court may order an issue under the garnishee clauses of the Common Law Procedure Act, 1854, to be tried in the Mayor's Court; the object of this clause was to enable the judges to save suitors the expense of a trial in the superior courts where the amount in dispute was small.

x See cap. xi., Of the Removal of an Attachment.

y See cap. xii., Of Pleading an Attachment.

tion to stay the proceedings in the action, on the ground that the property in issue in the action was attached[z] in the garnishee's hands; perhaps, however, if any proceedings were taken in the attachment by the defendant unfairly to delay judgment and execution in the attachment, the court might interfere. The Mayor's Court would test the *bona fides* of any proceedings in the attachment tending to delay the plaintiff in obtaining his judgment and execution.

As to bankruptcy and insolvency of the parties to an attachment, see *post*.

---

[z] *Smidt* v. *Ogle*, 6 Taunt. 74; *Roberthon* v. *Norroy King at Arms*, 1 Dyer, 83, pl. 76. To some extent this may work a great hardship on the garnishee, for if after the attachment made an action is brought by the defendant below against the garnishee to recover the money attached, and execution is not executed in the attachment until after the action has been commenced, the garnishee must plead the execution to the further maintenance of the action, even to plea *puis darrein continuance*, the action brought by the defendant not being any answer to the attachment; it therefore entails the payment of costs by the garnishee, although only an innocent stakeholder.

It appears, formerly, by the certificate of Starkey, Recorder (Appendix), that "pending any attachment undetermined and undiscussed, and before "execution thereupon obtained, the defendant in the attachment could "not maintain any action of debt against the garnishee for any money so in "his hands attached if such attachment by the garnishee should be pleaded "and alleged against the defendant." There appears some reason in this, as the defendant can always appear in the Mayor's Court and dispute the claim of the plaintiff if it be not well founded; and, if it be so, the defendant should scarcely be allowed to defeat the claim of the plaintiff by the process of another court, besides compelling the garnishee to pay the costs of the action, especially as the defendant, should he be dissatisfied with a trial in the Mayor's Court, is at liberty to remove the action into a superior court.

CHAPTER II.

WHAT PROPERTY IS OR IS NOT LIABLE UNDER THE CUSTOM.

HAVING treated of the nature and effect of an attachment, we must now consider what property is or is not liable to be taken under it. There are many attachments made upon property not strictly attachable, and under which plaintiffs constantly obtain a settlement of their demands, without going further perhaps than the mere first process; these attachments, however, can only be considered as speculative, and are not in any manner to be taken as guides for other cases. It must be our object here strictly to consider the custom, in order that it may be pursued with effect.

As to the nature and character of the property liable to the custom, it may be said that almost every species of property bearing a positive value, and upon which an actual price may be put by appraisement, can be taken under it; property perishable as well as imperishable, merchandize of all descriptions or the produce, furniture, jewels, wearing apparel, goods in bulk, or in boxes locked [a].

A debt or debts may be attached; if the debt be larger than the attaching creditor's debt, then a portion of such debt [b]. Under the term debt, may be included money due from the garnishee to the defendant; held by the garnishee as banker

---

a Bohun, 266; Ashley, 26; Com. Dig. Att. C.; *Goods-Hern* v. *Stubs*, Godbolt, 401.

b Bohun, Priv. Lond. 261; *Westoby* v. *Day*, 22 L. J. Rep. (NS.) Q. B. 418; *Webb* v. *Hurrell*, 16 L. J. Rep. (NS.) C. P. 187; S. C. 4 C. B. 287; Com. Dig. Att. C.; Godbolt, 196, 297; Roll. Ab. tit. Cust. Lond.; Bac. Ab. tit. Cust. Lond. H. 1; Viner, Ab. tit. Cust. Lond.; *Andrews* v. *Clerke*, Carth. 25; *Pearce* v. *Calcott*, W. Jones, 406; *Bellamy* v. *Upton*, 1 Shower, 356, case 229.

of the defendant; money due from the garnishee for goods sold and delivered, or services rendered, or money received by the garnishee as factor or agent of defendant, and almost any kind of demands which may be recovered under the common money counts.

Debts incurred in foreign currency are attachable, for they are capable of valuation [c]. An attachment of a debt will include a debt payable immediately or at a future day, so that it be *debitum in præsenti solvendum in futuro* [d], as money owing from the garnishee on prompt or any certain credit given to the garnishee for goods sold; or money on a policy of insurance, when it is payable so many months from the death or notice; or money placed on ordinary deposit with a banker, when notice of withdrawal alone is required by the defendant, for the attachment is equivalent at least to the notice. But the *debitum in præsenti solvendum in futuro* will not include sums payable to the garnishee for goods belonging to the defendant sold upon credit by him as factor or agent on account of the defendant, for it is uncertain whether the garnishee will ever receive the amount for which the goods were sold; but, if the garnishee is the factor or agent of defendant on a *del credere* commission, inasmuch as the garnishee is liable to the defendant for the amount of the sale whether he receive it himself or not, it is attachable.

Unliquidated amounts of any kind are attachable if they are capable of being ascertained [e], but anything merely in the

---

c *Harrington* v. *Macmorris*, 1 Marshall, 33; S.C. 5 Taunt. 228

d Com. Dig. Att. C.; Bac. Ab. tit. Cust. Lond. H. 2; Roll. Ab. tit. Cust. Lond. G.; Viner, Ab. *ib.*; Bohun, 261, 262; Locke, 28, note o; *Self* v. *Kennicot*, 2 Show. 506; *Robins* v. *Standard*, 2 Keb. 202; S.C. 1 Sid. 327; *Pearce* v. *Calcott*, W. Jones, 406. See *Leuknor* v. *Huntley*, Cro. Eliz. 713; *Dalton* v. *Selby*, *ib.* 184; S.C. 3 Leon. 236; *McDaniel* v. *Hughes*, 3 East, 374; Dyer, 83[a], pl. 76. As to how judgment given, see *post*.

e MS. Reports Mayor's Court, cited in Locke, 31. See *Bellamy* v. *Upton*, 1 Shower, 356, case 229.

nature of damages [f], such as for assault, trespass, slander, which a jury alone can determine, are not attachable, as an attachment does not sound in damages, nor where any claim exists for damage, even where the amount by any agreement is to be ascertained by a particular method, can it be attached until that amount is ascertained, but when so ascertained it can be; so also where a claim exists for damage, and the parties agree the amount, here, as an account stated exists, so an attachment will lie.

It is said [g] that salaries and wages of every description are not attachable, whether payable by government, corporate bodies, or individuals. But no authority is given, and no reason can exist, for such a doctrine; probably it arose out of the question of seamen's wages [h], but it is now and has been the constant practice for years to attach salaries, &c., provided there be no other reason for the attachment not lying; but an attachment of salaries and wages may always be defeated where payment be made before they are due, as an attachment will not affect a debt until it be absolutely due; if, therefore, when a salary is due on Christmas-day, it is paid the day before Christmas-day, there existed no moment at which a debt accrued. Debts on covenant are attachable; so money due on bonds [i]. Under the term debt can only be included demands capable of being enforced by process of law. It will not include voluntary payments, such as pensions of the East India Company, &c.; but all pensions are not voluntary, therefore if a pension or annuity is granted for a consideration, or under

---

[f] Roll. Ab. tit. Cust. Lond. E.; Vin. Ab. *id.*; Anonymous, 2 Shower, 373, case 355.

[g] Ashley, 27.

[h] Seamen's wages could not be attached with effect, because a summary remedy existed for their recovery by statute.

[i] *Robins* v. *Standard*, 1 Sid. 327; S. C. 2 Keb. 202; Roll. Ab. tit. Cust. Lond.; Vin. Ab. *id.*; *Leuknor* v. *Huntley*, Cro. Eliz. 593, 713; Ashley, 26; Com. Dig. tit. Att. C.H.; *Ingram* v. *Bernard*, 1 Ld. Raym. 636; Bohun, 267.

the terms of an Act of Parliament, and upon failure of payment the party entitled could maintain his action at law for its recovery, it may be taken as a rule that it is attachable.

In attaching money due on bonds the sum due on the forfeiture cannot be attached, for the bond is forfeited; and, as the penalty of the bond is due, the sum in the condition cannot be attached, but the penalty may, and the court gives judgment for the sum due.

No attachment can be made of an equitable debt or demand; that is, where the recovery of such debt or demand from the garnishee must be by means of a court of equity. Ashley, in his Doctrine and Practice of Attachment, says:— "In regard to these equitable debts it may reasonably be "questioned whether the general rule of exempting from at- "tachment all debts for which at law no action can be main- "tained should not be applied with some degree of limitation. "The reason a legacy cannot be attached is, that creditors "have an interest in it till all their debts be paid, and the "executor or administrator may successfully resist such at- "tachment, either by plea or evidence in the Mayor's Court, "or by prohibition from the King's Bench. But admitting, "for instance, that the debts are all paid, or that the executor "or administrator, willing to take the responsibility upon "themselves, suffer judgment to go against them, the above- "mentioned reason fails. Is not, therefore, such judgment "valid? Could the legatee bring an action at law against "the garnishee for his legacy, there is little doubt that he "would succeed. But in a suit in equity, instituted for the "recovery of the legacy, it may be presumed that the gar- "nishee might avail himself of the judgment with effect, ac- "cording to the maxim that he who seeks equity must first "do it, and nothing can be more consonant to equity than "that a man should pay his just debts."

This doctrine, however, appears questionable so far as regards the debt being attachable, while simply an equitable

debt, as foreign attachment is to have no countenance in equity further than the custom carries it[k]: but the reason for not attaching a really equitable debt appears to be that no such debt exists without involving other considerations; and, as foreign attachment will alone attach a debt which, in itself, is clear and independent of other considerations, the attachment of an equitable debt does not come within its scope; and, if otherwise, it might lead to injustice and interminable issues amongst parties between whom no privity existed.

Legacies are not attachable; it is uncertain if the executor have assets sufficient to pay the debts, and the creditors have an interest in them, and "they cannot be warned[l]." All trust property is in the same position, when a court of equity must be applied to to afford relief; but, although a debt in its origin may be an equitable debt, yet the character may be changed, as where an executor has stated an account or admitted a legacy, either a distinct legacy or a portion or distributive share, although the accounting need not be with the legatee himself, but such an accounting or admission of the legacy or share whereby the executor becomes liable to an action of money had and received, then the debt is attachable[m]; but an action at law for a distributive share of an intestate's property cannot be maintained against the administrator, nor against the administrator's executor, although he may have expressly promised to pay, therefore no attachment will lie[n].

A trustee or partner is in the same position as an executor in this respect; as, although the *cestui que trust* must in general pursue his remedy in equity, yet if the trustee state an

---

[k] Freeman, 312.

[l] *Page* v. *Davis*, 3 Bulst. 243; Bac. Ab. tit. Cust. Lond. H.; *Chamberlain* v. *Chamberlain*, 1 Chan. Cases, 257; Com. Dig. tit. Attachment, D.; Ashley, 29; Bohun, 267; Roll. Ab. tit. Cust. Lond. E.; Viner, Ab. *id. ib.*; Noy, 115. [M. 700.

[m] See *King* v. *Ladd*, 24 Law Times, p. 172; *Hart* v. *Minors*, 2 C. and

[n] *Jones* v. *Tanner*, 7 B. and C. 542.

account and admit a balance due from him to his *cestui que trust*, he may be sued at law[o]. So also if he admit a balance and afterwards appropriate it to his own use; and therefore, under such circumstances, the amount is attachable in the hands of the trustee; so, if the trusts are complete and ended, the balance may become attachable, as if A. make an assignment of a debt due to him to trustees, to secure the payment of a debt due by him to B., and all costs, and to pay the balance to A., and after the receipt of the debt and the payment made of the debt to B. and all costs, here, as an action for money had and received would lie[p] for the balance, so an attachment may be made of it; and such attachment cannot be defeated by A.'s taking any other remedy than the action at law, *ex contractu*, to obtain the balance[q]; but if the trusts are open and not complete, as if a trust be to pay a debt and costs and the debt be paid but the costs not ascertained or paid, here, as it is uncertain what may be the amount required, the only remedy for A. is in equity for an account, and therefore an attachment cannot be made upon it[r].

The garnishee may at times have possession of goods belonging to the defendant which are perishable, as fish, fruits, *&c.*; these are attachable, but the attachment in such cases does not preclude the garnishee from selling them; that is, although he is warned not to part with the goods of the defendant, yet, the attachment being in the nature of an equitable proceeding, it does not forbid the garnishee carrying out the transaction between the parties and selling the goods, where the retention would be a palpable loss, and therefore

---

o *Roper* v. *Holland*, 1 Harr. and Wol. 167; S.C. 3 Ad. and Ellis, 99; and see *Bond* v. *Nurse*, 10 Q. B. 244.

p *Edwards* v. *Bates*, 7 M. and G. 590; *Case* v. *Roberts*, Holt, N.P.C. 500.

q Bac. Ab. tit. Cust. Lond. H. 1; Roll. Ab. tit. Cust. Lond. E.; Vin. Ab. *id. ib.*; Bohun, 267. See *post*, Pleading an Attachment.

r *Edwards* v. *Bates*, 7 M. and G. 590

the license of the court is assumed to be given to the garnishee to dispose of such property. Neither is the direction of the court so rigid that a garnishee may not at times part with goods if by the retention he would lose the market, or that a great loss would be thereby sustained, the intention being not to interfere with the transaction of the parties and their endeavours to obtain the best market, but to forbid the garnishee from parting with the property or proceeds to the defendant [s].

It is said that by the custom securities for money may be attached in the same manner as debts, but if this is so it must at least be taken with the greatest caution, and each species of security must almost form a rule for itself; if the rule, however, is taken indiscriminately, putting aside the almost impossibility in some cases of valuing such things, great fraud might be perpetrated.

Securities which have a public price upon the public market, and are quoted from day to day, and which are transferable by delivery, may perhaps bear such a notorious price that a fair valuation may be made, and the delivery may perfect the title, such as Exchequer bills, India bonds, bonds of a foreign state, mining or railway scrip, and attachments upon this kind of securities have constantly been made; but where shares stand in the name of the defendant and are not transferable by delivery, but require a deed of transfer to be executed, the question arises, who will execute? There is no power in the court to compel execution of the transfer by the defendant, for in an attachment he is not before the court, and there does not appear any method of enforcing him to sign it; therefore the court cannot give a title to the purchaser, it could not give it to the plaintiff even if the shares were appraised and delivered to him, as the court of itself possesses no power to give title by any seizure and sale. In the case

---

[s] See cap. ix., Of the *Elongavit*.

of a bill of exchange, if it be remitted to the garnishee by the defendant on account of the defendant, and requiring the indorsement of the garnishee to make it negociable, the execution in the attachment would be against the garnishee for the bill of exchange, or, in default, against his person, for the amount of the appraisement of it; but should he tender the bill of exchange under the execution, but refuse his indorsement, it may be questioned how far such indorsement can be compelled; and a manifest injustice might be done the garnishee by compelling him to incur a liability by the indorsement of the bill, as if a bill of exchange belonging to the defendant requiring the indorsement of the garnishee were in his hands, and such bill were indorsed by the garnishee and should be taken under judgment in an attachment, if the bill were not paid on its arriving at maturity the garnishee might be sued upon his indorsement, unless qualified as *sans recours*, and he would have to pay the amount with only the defendant to look to to recoop him. It will therefore be seen that the question of the power of transfer forms a material element in the consideration of whether any particular security is attachable or not; and, with regard to securities, even where no question may exist as to their transfer, a difficulty arises as to the appraisement. Bills of exchange, bonds, &c., of private persons can only be taken as chattels subject to appraisement; and, as they do not bear any public value, the appraisement must be made according to the information of the appraisers, or according to the standing of the maker in the eyes of the appraisers; thus a bill of exchange might be appraised at so serious a discount that palpable injury might accrue to the defendant. If the plaintiff were aware the parties to the bill were bad he would not receive it under the attachment; on the other hand, if it was appraised to him at a sum below the amount expressed on the face of it, and the bill were paid, he might obtain by means of the attachment more than his just debt at the expense of the defendant. It is therefore neces-

sary in making an attachment to consider attentively the nature and effect of every security which it is sought to attach under the custom. If, however, securities are attached, the plaintiff ought to be compelled to take them at the amount expressed on the face. If an attachment be made of a security, no action will lie at the suit of the defendant against the garnishee in trover, until the attachment is disposed of, as it is *in custodia legis* [t].

Some property is specially exempted from attachment by statute, as the public funds, stock of the Bank of England [u], and dividends thereon [v], East India Company's stock [w], the capital-stock or funds of the London Dock Company [x], or the capital-stock or premises of the St. Katherine's Dock Company [y], or seamen's wages [z], and in the case of bankruptcy or insolvency of the defendant the property which originally was attachable and attached may become protected from further attachments, and those already made become inoperative.

It may be convenient here to allude to property which in itself would be attachable except for its peculiar position which exempts it; as property in the custody of the law, such as goods taken in distress, or impounded [a]. So property of which the superior courts have taken cognizance by suit, for it would be interfering with their jurisdiction [b]; thus a debt which is in suit there is not attachable, nor property for which trover has been brought; but this does not restrain

---

t *Verrall* v. *Robinson*, 4 Dowl. 242; 2 C. M. and R. 495; S. C. 5 Tyr. 1069; S. C. 1 Gale, 244.

u 8 and 9 Wm. III. c. 20, § 47; 7 Ann, c. 7, § 62.

v 9 and 10 Wm. III. c. 44, § 74; Com. Dig. tit. Att. D.; Ashley, 30.

w 17 and 18 Vic. c. 104, § 233.

x 9 Geo. IV. c. cxvi. § 11.

y 6 Geo. IV. c. cv. § 10.

z See *post*.

a *Humphrey* v. *Barns*, Cro. Eliz. 691.

b *Humphrey* v. *Barns*, Cro. Eliz. 691; Bohun, 265; 2 Show. 373, case 355; Bac. Ab. Cust. Lond. H. 1; Com. Dig. Att. D.; Roll. Ab. tit. Cust. Lond. F.; Vin. Ab. *id. ib.*; *Palmer* v. *Hook*, 1 Ray. 727; *Leuknor* v. *Huntley*, Cro. Eliz. 593, 712; 3 Leonard, 210; *Babbington* v. *Bab-*

the plaintiff from laying an attachment on other property of the defendant in the garnishee's hands, so that it is not included in the action. So the amount recovered against a garnishee by a defendant in an action brought by the defendant against him cannot be affected by any attachment made in his hands, or before the amount is paid over to the defendant (the plaintiff in the action) or his attorney, and the attachment would be no answer to an execution in the action; but when the debt sued for is paid over to the plaintiff's attorney, either in settlement of the proceedings or under execution, it is no longer protected, for the suit is at an end, and it is therefore liable to the attachment. Money due from a client to his attorney for costs on the master's *allocatur* upon an order obtained by the client for taxing the bill is not attachable[c], nor property sought to be recovered by a summons issued by a magistrate where such magistrate has power to order it to be delivered up by the garnishee to a defendant. Nor money or property in the hands of any person as an officer of any court of justice holding the property under the direction of such court[d], as the money or property is in the court itself and liable to the order and direction of that court; as money in the hands of the masters of the courts at Westminster, or registrar of the Court of Admiralty, although the court in which such money is may have directed its officer to pay the same to the defendant; and it matters not what court it may be, whether superior or inferior, so that

---

bington, Cro. Eliz. 157; S.C. 3 Leon. 232; *Pell* v. *Pell*, Cro. Eliz. 101; Sir John Perrot's case, Cro. Eliz. 63; *Kerry* v. *Bowyer*, Cro. Eliz. 186; Danv. Ab. Cust. Lond. F.; 1 Leonard, 264; see Com. Dig. Att. C.: Neither after suit in equity, 2 Ch. Cases, 233; a duty which accrues by matter of record, as judgment recovered; Sir W. Waller's case, 3 Leon. 240; Sir John Perrott's case, 1 Leon. 29; 1 Modern, 103; Com. Dig. Att. D.; Vin. Ab. tit. Cust. Lond. E.; Cro. Eliz. 63, 186; Roll. Ab. tit. Cust. Lond. E.; Bohun, 265; Ashley, 27.

[c] *Coppell* v. *Smith*, 4 T. R. 312; Ashley, 28.

[d] *Vide post*, p. 39.

the same be a court having jurisdiction over the property and its disposition. Neither money in the sheriff's hands under an execution [e], and it would be no answer to a rule for an attachment against the sheriff. Money directed to be paid under an award of an arbitrator, made in pursuance of a rule of a superior court, is not attachable [f]. So also where the submission to arbitration is made in an action, but the submission is not made a rule of court, provided no *non pros.* is entered in the action, for then the suit is still pending. But if the parties refer to arbitration without action, merely giving power to make the submission a rule of court, until it is so made a rule of court the money payable under the award is attachable, as the court has not taken cognizance of the reference. Or if parties refer to arbitration by bond of submission, though in an action in a superior court, and the person to whom the money is by the award to be paid elects to bring an action on the award after the attachment made, the attachment is good against such action though not against an action upon the bond [g]; but although money in the garnishee's hands may be protected by a suit at the time of the attachment made, yet if it cease any time before plea pleaded by the garnishee in the attachment the attachment takes effect, as the attachment affects all property in the hands of the garnishee from the time of making the attachment to the time of the garnishee's plea, provided such property is stated in the record; as if the defendant have brought an action against the garnishee to recover certain property, and an attachment is afterwards made of the same property in the garnishee's hands by a creditor of the defendant, and before the action is at an end the garnishee pleads in the attachment, here there is no moment of time at which the attach-

---

e Ashley, 28; 1 Leon. 264; Bohun, 265; Com. Dig. Att. D.

f Ashley, 28.

g *Ingram* v. *Bernard*, 1 Ld. Raym. 636; S. C. 3 Salk. 49.

ment could take effect, because the action overrides it to a time past the plea; but if after the attachment made and before plea pleaded in the attachment the action is discontinued or got rid of, then the protection ceases and the attachment takes effect. So an attachment will not affect property in the hands of a police officer taken from a prisoner during the inquiry into the charge against him; but if upon the final hearing of the charge, and before the garnishee has pleaded, the magistrate or judge refuses to make an order relative to the property, the attachment takes effect.

It may also be convenient here to notice another position in which property may be in the hands of the garnishee belonging to the defendant, and although liable in all other respects to an attachment yet may be withdrawn from its effect, as where the law has given a summary remedy for the recovery of it out of the garnishee's possession by the defendant; thus, where a magistrate may have power to summon the garnishee and direct payment or delivery of any property, if the magistrate so order, the attachment is no answer, but without the summons and order the attachment is good [h]. So rent payable to the defendant by the garnishee [i], for the landlord has the power of distress; but should the landlord not distrain, and the tenant leave the premises owing rent, inasmuch as the power of distraint is gone and the only remedy be by action, it is attachable. This summary remedy must exist by law, and not by virtue of any agreement between the parties themselves, as an authority given by one man in possession of another's goods, in case of non-delivery of them on demand, for the owner to seize the goods, will not defeat an attachment made of the goods, either before or after the demand.

We have seen that a garnishee can only be served with the attachment while within the city of London or liberties

---

[h] See *post*, p. 40. [i] Ashley, 27; Bohun, 267; Com. Dig. Att. D.

thereof; this arises, at least with respect to the Mayor's Court, from the circumstance of the court being so far a court of local jurisdiction that its officers cannot leave the liberties of the city for the purpose of serving an attachment. This local jurisdiction will not, however, deprive the plaintiff of his right under the process of attachment to recover a debt owing from the garnishee to the defendant, although the debt may have accrued to the defendant out of the city of London or liberties, or the jurisdiction of the Mayor's Court, as it matters not whether such debts were contracted in or out of the city; for as every debt follows the person of the debtor, if such debtor (garnishee) be found within the city and is there served with the attachment, it is sufficient[k].

With respect to goods, it has been considered questionable whether they do not stand in a different position to money, and whether they, as well as the garnishee, ought not to be within the city at the time of the service of the attachment[l],

---

[k] *Harrington* v. *Macmorris*, 1 Marshall, 33; S. C. 5 Taunt. 228; Boh. 261; *Andrews* v. *Clerke*, Carth. 25; *Cook* v. *Licence*, 1 Ld. Raym. 346; Bac. Ab. tit. Cust. Lond. H. 2; *Ib.* tit. Prohibition, K.; Anonymous, 1 Vent. 236; *Westoby* v. *Day*, 22 L. J. Rep. Q. B. 425; *Mallum* v. *Herne*, Mic. 19 Car. II. B. R., cited 2 Shower, 507; Roll. Ab. tit. Cust. Lond. E.; Vin. Ab. *ib. id.*

[l] The case usually cited to support this proposition is that of *Hearn* v. *Stubbs* (Godbolt, 401), but on looking into that case as reported by Godbolt, and the report of the same case in Latch, 208, there does not appear to be any reason for making a distinction between the possession by the garnishee of money or goods. The action was brought for a cloak; the defendant pleaded an attachment in the Mayor's Court, to which plea there were three objections taken; the third was the material one. "It showeth "that the goods were attached in the defendant's hands, but it does not "show that it was within the liberty of the city, and all the proceedings "are *infra jurisdictionem.*" The third objection, as stated in Latch, is "*Tiercement, n'est monstre que le detour fuit deins le city al temps.*" Here clearly the objection stated is, that the attachment was not made within the city; *i. e.* that it did not show the garnishee was within the city at the time of making the attachment; this point, though not settled, as the case of *Hearn* v. *Stubbs* though reported was never decided, was sub-

or at least that after the garnishee has been served with the attachment it does not take effect upon the goods until they come within the jurisdiction of the Mayor's Court.

Having seen what property is attachable or not on account of its general character, we must now consider it in relation to the rights of the parties and strangers to the suit.

As a rule, though not without exception, it may be said that if the property intended to be attached is so circumstanced that the owner thereof could maintain his action of *debt sur concessit solvere* [m], or *debt assumpsit, trover,* or *detinue* against the garnishee for the same, and if withheld could not legally enforce payment or delivery thereof by a summary or any other mode of proceeding short of an action at law, it may in general be considered that it is attachable by the custom. This principle arises out of the common law, which,

---

sequently raised in *Crosby* v. *Hetherington,* and there the objection was held fatal, as the custom as pleaded did not show that the serjeant had not gone out of the city to serve the process.

It will be observed that the objection as stated in both reports of the case refers only to the garnishee being in the city at the time of service; but there is a suggestion by counsel in the report of Godbolt beyond the objection, and without its scope, "that it was not showed where the goods "were, whether within the jurisdiction of the city," and he refers to Rastall's Entries, 156, 157, but these entries are not in point.

The defendant would be entitled to demand his goods of the garnishee without reference to the place in which the goods were deposited, whether within the city or without; and he would be entitled to make the demand within the city even if the goods were not there, and upon which he might bring his action in the Mayor's Court; and the plaintiff is placed by the attachment in the same position as the defendant, with all his rights against the garnishee.

The custom, however, as stated in *Liber Albus,* is, that such goods shall be arrested wheresoever they be found within the said city—"*ou qils soient* "*trovez deins la citée*;" this is evidently intended to be comprehensive. At the time it was written the city walls inclosed the whole of London; and it will be observed that the necessity of the garnishee being in the city is not mentioned.—See Appendix.

[m] See *post.*

as to determining the rights of the parties, pervades every proceeding by foreign attachment, and is necessary to be borne in mind in considering the question whether any particular property is attachable; for if the defendant might bring an action as above against the garnishee for the monies or goods in his hands, the plaintiff in almost all cases stands as against the garnishee in the position of the defendant [n], and the attachment is in its effect, as to determining the rights of the parties, equivalent to an action brought by the defendant against the garnishee, and after the attachment is made no act of the defendant can have any effect so as to defeat it, unless he may possess a remedy against the garnishee for the recovery of the property, a remedy given to the defendant under some process by some superior power, and to which process the attachment will form no answer.

With respect to the possession of the property by the garnishee. The garnishee is in general the factor, broker, consignee, or banker of the defendant; he must be the agent of the defendant expressed or implied, and to render any property in his possession attachable as the property of the defendant he must hold it to the use of the defendant, and must be liable to account to the defendant for it in an action at law.

If the garnishee is not in this position towards the defendant relative to the property in his hands, no attachment will lie upon it, as against the defendant, notwithstanding that the garnishee may hold property in his hands which may be the actual property of the defendant.

If goods are consigned by the defendant to his agent, and the agent warehouse the goods, the possession as against the defendant is not in the warehouseman, but in the consignee, the warehouseman being the agent of the consignee and not

---

[n] See Gibbs, C. J.; *Giles* v. *Nathan*.

of the defendant, therefore they cannot be attached as the property of the defendant in the hands of the warehouseman, but may be in the hands of the consignee. So property in the hands of a broker, entrusted with goods for sale by the consignee of the defendant abroad, cannot be attached as the property of the defendant, for the broker is the agent only of the consignee. So freight due to the owner of a ship cannot be attached as against him in the hands of a broker, who receives goods from on board ship and enters them at the Custom-house for and on account of the consignee, for the consignee alone is liable to the owner.

So goods entrusted to a carrier cannot be attached in the hands of the driver of the carrier's cart, but must be attached in the hands of the carrier. Money transmitted to a banker by his country agent for A. is not attachable as A.'s until A. has assented thereto or acknowledged the money as his [o]. But where money in the nature of payments on account of annuities or pensions was sent in bulk, and the bulk was received by a banker or agent for distribution among certain persons named in the advice, and the defendant kept an account at such banker's or agent's, drawing on the sums in his hands, and the banker or agent on receipt of the bulk placed the portion payable to the defendant to his account, although not according to his express instructions but in accordance with former instances, it was held that this was a sufficient acknowledgment of the agency of the banker and receipt of the money on the account of the defendant, and therefore attachable as the property of the defendant. So where dividends on the funds are similarly received on account of the defendant, by his agent, they are attachable without further acknowledgment by the defendant.

Property belonging to the defendant in the hands of the finder is attachable [p]; but property in the hands of a tres-

---

[o] See *post*, p. 42.

[p] *Tross* v. *Michell*, Cro. Eliz. 172.

passer is not attachable [q]; but if the garnishee take the property tortuously, and afterwards and before plea the defendant acknowledge and adopt the possession, then it is attachable. And even where the taking of the property was against the will of the defendant, provided it was legal in its inception, as property taken by an officer from a prisoner charged with felony, where the court upon the trial of such prisoner refused to make an order of restitution, it was held that the property was well attached.

The property must be vested in the garnishee, that is, the person or persons named as garnishees must have the exclusive right of possession, or it is not attachable; as property of the defendant intrusted by him to A. and B. jointly, cannot be attached as against him in the hands of A. or B. solely, and *vice versa*; thus too many or too few garnishees are alike fatal [r].

With regard to the title of the property being vested in the defendant, it must always be borne in mind that the plaintiff cannot by the custom compulsorily place himself against the garnishee in a better position in relation to the property than that of the defendant, and as a rule, the plaintiff cannot by his attachment at any time acquire a greater right in the property than that of the defendant himself, nor can he by his attachment destroy or affect any rights or interest in the property possessed by other parties, not parties to the attachment, provided such right or interest has not accrued to them either under a revocable authority of the defendant [s], or subsequently to the making of the attachment. This right or interest of other parties must exist against the garnishee [t] as well as against the defendant, for although a

[q] Bac. Ab. tit. Cust. Lond. H.; *Stanmor* v. *Amone*, Boh. 267; Roll. Ab. tit. Cust. Lond.; Viner, Ab. *ib. id.*

[r] See Amendment.

[s] See *post*, p. 51.

[t] See cap. x., Of the Bill of Proof.

defendant may not possess any absolute title to the property, yet he may have such a right in him as against the garnishee as would enable him to recover it out of his possession; as if an agent in his own name enter into a contract with the garnishee for the sale to him of goods of his principal undisclosed, or where the defendant has such a special property in the goods as would enable him to support an action of trover against the garnishee [u], in such cases, as the plaintiff by his attachment places himself as against the garnishee in the position of the defendant, he will have the same right against the garnishee that the defendant had; therefore, where a garnishee is estopped from disputing the title of the defendant to the property, he cannot question the right of the plaintiff to recover it in the attachment; but if a garnishee may legally refuse to deliver to the defendant the property in question, the same circumstances which will create a defence to an action brought against the garnishee by a defendant to recover the property, will, if raised on the trial of the attachment, form a sufficient answer to the plaintiff in an attachment of the same property, as property of the defendant. It does not, however, follow that a garnishee may not have a good defence to an action, and yet, if willing to assist a plaintiff in an attachment, he may do so without prejudicing himself, as where he may have a technical defence to the action of the defendant against him, and yet may not choose to raise it as a defence in the attachment; thus, where an attorney cannot recover in an action against his client the amount of a bill of costs not delivered signed, provided the client plead the non-delivery of a signed bill, yet, inasmuch as the client need not so plead, if the amount be attached in his hands and he pay it over under the attachment, he may plead the payment under the attachment in answer to an action brought on the subsequent delivery of a signed bill. The garnishee may be in the same

---

[u] See also *post*, p. 48.

position where the debt owing from him is barred by the statute of limitations, or in the case of infancy, &c.

Money *primâ facie* belonging to the defendant in the hands of the garnishee, where no privity exists between the garnishee and defendant, is not attachable as the money of the defendant; as in the case of money transmitted to a banker by his agent, with directions to pay amongst others a certain sum to A., here, until the banker has by some act acknowledged to A. the possession of the money on his account, no action will lie against the banker at the suit of A. for the recovery of the same, and therefore no attachment will lie upon it in the hands of the banker, as the money of A.; but if B. pay money into a banker's to the account of A., here the receipt by the banker is an acknowledgment of A., and can be attached, at least as far as the banker is concerned, as the money of A., for the money is received as and for the designated payee [v].

This rule will also apply to goods, unless the possession of goods differs from the possession of money. If the mere notice to the holder of goods by the owner, to transfer them out of the name of the owner into that of a third person, is sufficient to change the property in the goods as against the holder without any acknowledgment of the transfer by him, then as the mere receipt of such notice by the holder of the property gives a right of action to such third person against him, of course the goods, after such notice, are not attachable as the goods of the party transferring [w].

Property in which the garnishee has an interest, and the defendant only becomes entitled thereto upon some contingency, is not liable to be attached until the contingency shall have happened [x], as in the case of property in the garnishee's hands

---

[v] See *post*, Revocation.

[w] *Hurry* v. *Mangles*, 1 Campbell, 452; Russell's Chitty on Contracts, 332, 375, and see *Holt* v. *Griffin*, 10 Bing. 246; *Gosling* v. *Birnie*, 7 Bing. 339; *Kieran* v. *Saunders*, 6 Ad. and Ell. 515.

[x] See *post*, p. 48.

to be delivered to the defendant upon the occurrence of some particular event, or upon the delivery of other property by the defendant to the garnishee, or in the case of money to be paid to the defendant by the garnishee under a contract for sale of property upon the defendant executing a conveyance thereof, and in cases where the operation of the contingency, the delivery of the property, or the payment of the money to the defendant by the garnishee is simultaneous, no attachment made prior thereto will have any effect; as where the garnishee being under a contract to deliver certain property, or pay a certain sum to the defendant upon receiving certain other property, or his executing a conveyance, and at a meeting between the garnishee and the defendant one executed the conveyance and the other handed over the property, the execution and payment or delivery being simultaneous no moment of time existed in which the attachment could take effect.

Property upon which the garnishee has a lien can only be attached, subject to such lien[y]. A lien, however, only forms a charge on the property to the extent of the garnishee's claim against the defendant, and therefore any surplus beyond that amount is liable to attachment. Under the custom the rights of a garnishee in respect of a lien receive a very liberal construction. If the garnishee, in the course of his dealing with the defendant, have at the request of the defendant and on his account accepted a bill of exchange prior to an attachment, it forms a lien on any property of the defendant's then in the possession or afterwards coming into the possession of the garnishee. So also if in like manner, prior to an attachment, the garnishee has at the request and on account of the defendant, rendered himself liable under any promise to pay a sum of money at a future day to a third person, this also forms a lien upon the defendant's property

---

[y] *Nathan* v. *Giles*, 5 Taunt. 557; Bohun, 270.

then or subsequently reaching the garnishee's hands, to the extent of the promise. So also if the garnishee has in like manner entered into an engagement, prior to the attachment made, whereby he has laid the foundation of a future liability, as if upon some contingency occurring he will pay a sum of money or give a bill of exchange or otherwise render himself similarly liable, although the contingency may not have happened, it still, to the extent of the possible liability, forms a lien. This liability on the part of the garnishee must be a liability in the ordinary transaction of trade or the usual course of dealing between them, or where it is agreed between the parties that the property shall stand charged with any specific lien, but in no case, except by special agreement, can a lien be created for unliquidated damages. The liability here spoken of must be a liability, not to the defendant, but to a third person, since wherever a garnishee is under a liability to deliver goods or pay money to a defendant, a promise to pay in action is implied by law, and an express promise can have no greater effect than such implied promise. The effect of an attachment is to revoke all promises made to the defendant by the garnishee; and if a promissory note or bill of exchange were given by the garnishee to the defendant, made payable to the defendant only and not to order, it would form no answer to an attachment, as the bill, not being negociable, the attachment would revoke the promise, and the judgment and execution in the attachment would form a good defence to any action brought by the defendant against the garnishee to recover the amount.

The lien or liability must have existence at the time of the attachment made to render it an answer to the attachment. The attachment as it were states an account between the garnishee and defendant at the time of its service, and the property cannot after that time be further charged, or other liability entered into by the garnishee, so as to defeat the plaintiff.

A distinction must however be drawn between the case of a lien being created by reason of a contract remaining incomplete and unfulfilled, as in the instances beforementioned, and the case of a transaction complete within the contemplation of the parties at the time it occurs, although it may happen that something may arise *in futuro* in respect of such transaction which will render the defendant liable to the garnishee, and thereby thus create a lien; as where the garnishees, being bankers of the defendant, discounted bills for the defendant, and the bills on arriving at maturity were dishonoured, the bills would then form a lien or set-off on any balance on the drawing account of the defendant with the garnishee, but if the attachment be made prior to the dishonour of the bills, the subsequent dishonour, though prior to a judgment in the attachment, is no answer thereto, for the contract between the parties was complete on the discount, the subsequent claim of the garnishee arising on the dishonour and not the discount of the bills. So if a banker discount bills for his customer and place the proceeds, after deducting discount, *&c.*, to the credit of the customer in his drawing account, and before the bills become due an attachment is made of the money of the defendant in the hands of the banker, the possession of the bills by the banker, even with the most positive knowledge that they will be dishonoured, forms no lien on the fund on behalf of the banker to defeat the attachment; but there is a great distinction between the absolute right to draw upon a banker, and the mere permissive right to do so. Therefore where a banker gives a mere permission to a customer to overdraw his account to a certain specified amount, inasmuch as the banker might withdraw the permission at any moment, any portion of such specified amount remaining undrawn would not be attachable; but if the amount is so placed to a customer's credit for a certain time for a consideration, then it is absolutely under the control of the defendant, and it becomes a right to draw, and

therefore attachable. In the one case it is a mere permission on the part of the banker which is revocable, and in the other it is the result of a contract which gives the defendant the absolute right in the money.

An exception, however, exists with respect to liens in the nature of rent, that is, where a defendant has lodged property in the hands of a wharfinger or warehouseman, at a rent accruing during the period the property may remain in his custody; this continues a lien on the property notwithstanding the attachment, as, independently of the ordinary right to a lien, the agreement of the parties would be sufficient to protect it from the effect of an attachment to the extent of the rent due; so also when goods are deposited for repairs, the amount due for repairs forms a lien.

Formerly it was held in the Mayor's Court that where the garnishee had a lien upon any property of the defendant in his hands, the plaintiff was bound to tender the amount of such lien before plea pleaded in the attachment, otherwise the lien would be an answer to the attachment, however small the amount of the lien might be in proportion to the property attached. This practice, however, has for some time past been altered, probably on the ground of the impossibility of the plaintiff knowing the amount of the garnishee's lien; and even if the plaintiff did know the amount, and pay it, it would not give him a lien on the property, or allow him to add it to the amount of his debt; and in the event of the plaintiff paying the garnishee's lien, it would not ensure him the possession of the goods, as, after the attachment and before execution, bail might be put in and the goods released, or defendant become bankrupt. The payment would therefore be made by the plaintiff without gaining any benefit for such payment, or any possibility of regaining the amount against the defendant, as it would be a voluntary payment of the defendant's debt to that amount.

The practice in the present day, in cases where there is

no reason to defend the attachment except on account of the lien, is for the garnishee generally to state the amount of his claim; and if the plaintiff admits it, he takes judgment by default for the property, subject to the lien. If the plaintiff disputes the claim, the garnishee appears, and must prove it on the trial. The jury then find the amount of the property in the garnishee's hands, and the amount of the lien thereon. The Court thereupon gives judgment that "the plaintiff have "execution of the said," *&c.*, "subject to the garnishee's lien "thereon, amounting to the sum of," *&c.*

The attachment, therefore, only enables the plaintiff to recover what the defendant might recover against the garnishee. If the lien be a mere matter of calculation or account, it is, prior to final judgment, referred to the Registrar; or if the lien is an accruing lien, as rent, *&c.*, then the Registrar calculates the amount upon signing final judgment in the attachment. The plaintiff then takes the goods at the appraised value.

Property in which the defendant is solely interested cannot be attached for a debt due by the defendant and another jointly[z]; neither can property in which the defendant is interested jointly with some other person be attached for a debt of the defendant alone[a]. Thus monies placed in joint account at a banker's by A. and B. cannot be attached as the monies of either A. or B. alone, although the account may be drawn upon either by A. or B. in their joint names or by each in his separate name, as that would be a mere arrangement for

---

[z] This however does not preclude a plaintiff, who has a claim against two persons jointly, from commencing his action against one of them entitled to property in a garnishee's hands, and, under the action, attaching such property; but this would of course render the plaintiff liable, in case of the dissolution of the attachment, to the consequence of non-joinder of the co-debtor.

[a] It appears that formerly such attachments were allowed, the person jointly interested being compelled to claim his interest under a Bill of Proof.

drawing, and cannot change the property; but if the account stand in the name of A. and B., and B. be a fictitious person or a person having no real interest in the money, and the account is to be drawn upon by A., or if the account stand in the name of "C. and Company," or in the name of "the Trustees of C.," or in any other name, and C. and Company, or the trustees or other name be fictitious, and the money really be solely A.'s money, this will not protect it from an attachment as the money of A.

The ownership of the defendant in the property must be considered, having regard to the relative position of the defendant and the garnishee in the contracts and transactions between them. Because where the garnishee cannot raise the want of title of the defendant in the property attached, as a defence to any action brought by the defendant against him for the same, he cannot raise it as a defence in the trial of the attachment, as in the attachment the plaintiff has every right against the garnishee that the defendant had; therefore if a defendant, one of two joint owners of a vessel entering into a charter-party with the garnishee without disclosing his co-owner, and an attachment be made of the amount due thereunder in the garnishee's hands as against the defendant alone, such attachment cannot be defeated on the trial by proof of the joint ownership only being in the defendant; neither will an attachment of the price of goods sold to the garnishee by the defendant (an agent), under a contract in the name of the defendant, without disclosing his principal, be defeated by evidence on the trial that the defendant had no interest in the goods except as agent of some other person [b].

Property in the hands of the garnishee belonging *primâ facie* to the defendant, but subject to some contingency in which other persons may have an interest, cannot be attached as the defendant's, as property deposited with the garnishee

---

[b] See cap. x., Of the Bill of Proof.

by A. under an agreement with B. as guarantee to insure the fulfilment of the terms of an unperformed contract entered into between A. and B., notice thereof having been given to the garnishee. Or property deposited with the garnishee as a stakeholder, to abide the issue of a legal wager; or money deposited with the garnishee as auctioneer, upon the sale by auction of an estate of the defendant, as the sale may go off, the defendant may not complete, and the auctioneer is a stakeholder, and considered in the light of a trustee for both parties, and is bound to retain the property deposited with him until it is ascertained which of the parties is entitled to recover it [c].

An attachment cannot defeat a creditor's right of stoppage *in transitu* [d], because it is said the right to stop *in transitu* is the elder and preferable lien, and not supersedable by an attachment; nor will an attachment of property, as the property of the defendant, protect it from the claim of the true owner, where the property has been obtained by the fraud of the defendant, if it be ascertained that the property attached is the subject or proceeds of the fraud; for as the fraud would be a good defence to the defendant's claim against the garnishee, so it would form a good answer to a plaintiff's in the attachment [e].

Goods bought by an agent for the vendee, and delivered by him to the vendee's packer, the vendee having countermanded the purchase by letter to his agent dated before such delivery though not received until afterwards, the vendor assenting to take them back, revests the property in the vendor, so as to avoid an attachment made on the property in the packer's hands, as the property of the vendee [f].

So where A. deposited goods with B. as a security for money

---

[c] *Burrough* v. *Skinner*, 5 Burr. 2639; *Duncan* v. *Cafe*, 2 M. and W. [244.

[d] *Smith* v. *Goss*, 1 Campbell, 282.

[e] MS. case cited in Locke, 41.

[f] *Salte* v. *Field*, 5 Term Rep. 211.

advanced by B., with a promise to deliver the bill of lading when it should arrive, indorsed to B., and C. was employed as a broker to receive and sell the goods, but before the bill of lading arrived the goods were attached in C.'s hands by a creditor of A.'s, it was held that the transfer of the property to B. was complete though the bill of lading had never been indorsed, and that therefore the attachment was no answer to an action by B. against C. for the proceeds [h].

Where a transfer or assignment for a consideration has been made by a defendant to a third person of any property belonging to him in the garnishee's hands, and a notice thereof is duly given to the garnishee, such property is not attachable as belonging to the defendant; for although the assignee cannot in his own name proceed against the garnishee to recover the property, but must for that purpose use defendant's name, yet it has become the property of the assignee, and the defendant is only trustee for the assignee [i]; but where no notice is given to the garnishee of such transfer or assignment, the money still remains, as between him and the defendant, the property of the defendant. If an equitable lien is created on property in the garnishee's hands, with notice to the garnishee of such encumbrance, a court of equity will give relief against an attachment made upon the property, as the property of the person creating the lien [k];

---

[h] *Giles* v. *Nathan*, 1 Marshall, 226; S. C. 5 Taunt. 558.

[i] *Lewis* v. *Wallis*, 2 T. Jones, 222; Bohun, 277; *Westoby* v. *Day*, 22 Law J. Rep. (NS.) Q. B. 418.

[k] See distinction between the operation of assignments at law and the operation of them in equity, Story on Equity Jurisprudence, § 1041 *et seq.*; and see *Scott* v. *Porcher*, 3 Merivale, 652; *Exparte South*, 3 Swan, 392; *Lett* v. *Morris*, 4 Sym. 607; *Burn* v. *Carvalho*, 7 Sym. 109; S. C. 4 M. and C. 690; *Yeates* v. *Groves*, 1 Ves. J. 280; *L'Estrange* v. *L'Estrange*, 20 L. J. Rep. (NS.) Chanc. 39; S. C. 13 Beavan, 281. *Anderson* v. *Kemshead*, 16 Beavan, 341; and see *Malcolm* v. *Scott*, 20 Law J. Rep. (NS.) Chanc. 17; S. C. 5 Exch. 601; S. C. 3 Mac. and G. 29; S. C. 3 Hall and T. 440.

but where parties are equitable incumbrancers or mortgagees of property, and their rights are known to all parties, but no notice is given of any claim of lien upon such property, it is attachable; and even in some cases it is attachable with notice when parties refuse to act upon it and constitute themselves the legal owners, claiming all the advantages which can arise from ownership, without fixing themselves with the disadvantages in the shape of liability which may attach to such ownership, as the parties are bound to take some active steps, either at law or in equity, to enforce their rights, and the garnishees are not bound to regard an assignment which the assignee declined to act upon [l].

No attachment, however, can be defeated by any such transfer, unless the instrument which claims to change the property is irrevocable, and such that a court of law would enforce, or a court of equity would compel, the performance of the contract raised by it [m].

It was formerly held in the Mayor's Court that a voluntary assignment of property made by a defendant to trustees for the benefit of creditors of the defendant, although such an assignment might be irrevocable, was no bar to an attachment by a creditor made before the property was administered, such creditor not being a party to the deed, upon the ground that the assignment was but an equitable transfer of the property which at law must still be considered the property of the defendant, and subject to the claim of any creditor who would avail himself of an attachment to procure a priority of payment. The like was also held in a case where an annuity was assigned to trustees for the benefit of creditors, the trustees being empowered by the deed at their option to give priority of payment to such creditors as they thought proper; but it is apprehended this ruling must be

---

[l] *Anderson* v. *Kemshead*, 16 Beavan, 341.

[m] See Story on Equity Jurisprudence, § 1041 *et seq.*

taken with some exception, as if the deed be an assignment, and executed by the trustees being creditors, or by a trustee and by any other person being a creditor, the relation between debtor and trustee is no longer that of mere principal and agent, but a valid trust is created in favour of the creditors, and which trust the creditors, or such as have executed the deed, have a right to insist on the performance of [o], in which case it would be a bar to an attachment made on the property included in the deed, as the property of the party transferring; but the mere preparation of the deed, and its existence at the time of the attachment made, signed by the defendant but without the signature of any creditor, was held not to defeat an attachment; or if an assignment be made for the benefit of creditors, the trustees not being creditors and no creditor being a party, it would be a mere deed of agency and revocable [p], and therefore the property would still be the property of the party transferring, and attachable as his.

Property of the defendant may also be in the garnishee's hands, subject to the rights of other persons, though not by the specific assignment of the defendant, but through the direction of the defendant to the garnishee to hold possession of it, or to appropriate it to the use or on account of some third person; and if the garnishee, in pursuance of such direction, have made a promise to such third person before an attachment, and thereby have rendered himself personally liable under his promise, the garnishee then holds the property in his custody charged to the extent of the promise on behalf of such third person, and the surplus alone is applicable to the attachment. Therefore if a defendant writes a letter to the garnishee requesting him to pay A. a certain sum of money out of the proceeds of property of the defendant's in his pos-

---

o *Mackinnon* v. *Stewart*, 20 L. J. Rep. (NS.) Chanc. 49; S. C. 1 Sim. [(NS.) 76.

p *Smith* v. *Keating*, 6 Com. B. 136.

session, to be realized by the garnishee; or if a defendant requests the garnishee to pay to A. a certain sum of money out of the monies coming at some future period to the garnishee's hands, on account of the defendant, and the garnishee before the attachment assent thereto, and promise A. to carry out the defendant's instructions, inasmuch as the garnishee has by his promise raised an *assumpsit* in favour of A., and which A. could enforce against him [q], the property held by the garnishee is charged to the extent of the promise. So also if the garnishee, having acted upon the faith of the order of the defendant to him, have before the attachment made advances to such third person upon the security of his interest in the order, or if an appropriation be made by the garnishee of the interest of such third person with his assent, it still protects the property to the amount specified in the order; but if the garnishee has not rendered himself personally liable to a third person, under the direction of the defendant, the property is still the property of the defendant, notwithstanding the order, for such directions or authorities are revocable, and the attachment operates as a revocation, inasmuch as the plaintiff stands in the position of the defendant, and has all the rights of the defendant in respect of the fund in the garnishee's hands.

Therefore where a defendant, being abroad, sent over a power of attorney to his agent in England, authorizing him to execute a deed of composition for a debt due to the defendant from the garnishee, but, before the deed was signed, the debt was attached in the garnishee's hands by a creditor of the defendant's, it was held that a subsequent execution of this power could not defeat the attachment by a relation back to the date of the power, for it was revocable until executed,

---

q *Walker* v. *Rostron*, 9 M. and W. 411; *Crowfoot* v. *Gurney*, 9 Bing. 372; *Lilly* v. *Hayes*, 5 Ad. and Ellis, 548; *Williams* v. *Leper*, 3 Burr. 1886; S. C. 2 Wils. 308; *Bampton* v. *Paulin*, 4 Bing. 264; S. C. 12 Moore, 497. See *Parsons* v. *Middleton*, 6 Hare, 261.

and the attachment was an equivalent to an express revocation by the defendant.

The power of the defendant to revoke the authority or instruction given to the garnishee still exists in the defendant, although the money may have been received by the garnishee, clothed with the express direction of the defendant and for the purpose of executing his orders, or even where the orders have been partially acted upon, but no promise made by the garnishee before the attachment to any third person; and it is not necessary that the garnishee should express a dissent from the required appropriation.

Where the defendant, having fallen into difficulties, held a meeting of his creditors, whereat a resolution was passed, and, in pursuance thereof, defendant gave the following authority to his solicitors, the garnishees: "Messrs M. and "Co., be pleased, in pursuance of a resolution of my credi- "tors, to employ B. to sell my furniture, *&c.;* and to receive "from him the proceeds, and divide same amongst my cre- "ditors rateably; also be pleased, in pursuance of the reso- "lution before referred to, to employ the same auctioneer "to sell, *&c.*, and to receive from him the proceeds of such "sale, and after deducting the amount of your lien, then "divide the same among my creditors." It was held that the authority was not irrevocable, no document having been signed either by the garnishees rendering themselves liable to the creditors, or by the creditors accepting the terms; and that, as the money was in the garnishees' hands under a revocable authority, the garnishees were liable to defendant, and therefore the property was liable in an attachment against him[r]. So where A. sent a letter to his agent, "Please to cash the enclosed cheque, and pay the same to "B.," any attachment made before a promise by the agent to B. to pay it to him is good as against A., although, in pursu-

---

r See *Smith* v. *Keating*, 6 Com. B. 136.

ance of part of the direction given, the agent had cashed the cheque. So where a banker had bills transmitted to him by his correspondent, with instructions to receive the proceeds and pay the same to A., and the banker, without making any promise to A., presented the bills and received the proceeds, here, in the absence of the promise by the banker to A., the property continues in the remitter and subject to his revocation of the authority, and cannot be attached as the money of A.[s] So if A. remit to B. a bank bill indorsed "Pay to the "order of B., under provision for my note in favour of C., "payable at the house of B., on the 1st January, 1830," B. received the proceeds of the bill and refused to pay them to C.; here, as B. had not agreed with C. to hold the bill or money to his use, he was not liable to him, and therefore the power was revocable, and the money was still A's[t]. But if A. pay money into a banker's to the account of B., here the receipt by the banker is an acknowledgment of B., and can be attached, so far as the banker is concerned, as the money of B., for the money is received as and for the designated payee[u].

Although in point of law, in such cases as the foregoing, the property may be liable to an attachment in the garnishee's hands, yet it may still happen that a third person has certain equitable rights over the fund, which a court of equity would enforce; as where the transaction between the parties amounts to an equitable incumbrance[v], although the debtor (garnishee) may not have assented thereto, provided relief is sought by such third person before execution in the attachment; but it would appear that it is not incumbent on the garnishee, where he has a knowledge of an equitable

---

[s] *Williams* v. *Everett*, 14 East, 582.

[t] See Russell's Chitty on Contracts, 535, 539; *Gibson* v. *Minet*, 2 Bing. 7; S. C. 9 Moore, 31; S. C. 1 R. and M. 68.

[u] *De Bernales* v. *Fuller*, 14 East, 590.

[v] See authorities, note [l], p. 50.

incumbrance existing on the funds in his hands belonging to the defendant but has no claim made upon him for the same, either to pay over the money or even to raise or litigate any right of the equitable incumbrancer, at all events where the attachment is known to the equitable incumbrancer, as if an equitable incumbrancer, with knowledge of the attachment, does not think fit to obtain possession, and another creditor more active take the amount in execution, a court of equity[w] will not compel it to be paid back[x].

The bankruptcy of any of the parties to an attachment has a different effect according to who the person may be becoming bankrupt. The bankruptcy of the plaintiff under an English bankruptcy does not affect the attachment, and his assignees may notwithstanding proceed to judgment and execution in his name[y]. The effect of the bankruptcy of the garnishee differs according to that which he may have done with the property of the defendant; if it be goods, and the bankrupt has converted them before the date of the adjudication or filing of the petition, the proceeds then fall into the estate: so also if it be money, and in neither case would the plaintiff reap any benefit from his attachment; but if the garnishee has not converted the goods, and they remain in his possession, ear-marked, the goods will still continue the goods of the defendant, for which he might maintain trover, and therefore the attachment would be good. The transaction, however, between the garnishee and the defendant must be subject to the 125th section of the Bankrupt Act[z], as to the property being in the order and disposition of the bankrupt, with the consent and permission of the defendant.

---

w *Anderson* v. *Kemshead*, 16 Beavan, 341.

x When courts of equity are spoken of, the equity side of the Mayor's Court is included.

y Ashley, 32.

z 12 and 13 Vict. c. 106.

Bankruptcy of the defendant virtually dissolves an attachment, as no creditor having made any attachment is allowed[a] to receive upon any such attachment more than a rateable part of such debt, unless execution under the attachment has been *bona fide* executed by seizure before the date of the fiat or filing of the petition[b], in which case the plaintiff will be entitled to the proceeds, provided he, at the time of the execution, had not notice of any prior act of bankruptcy[c]; but bankruptcy of one of the defendants would appear not to defeat the attachment made before the date of the fiat, or filing of the petition[d].

With respect to foreign bankruptcy, Mr. Justice Story says[e] the following propositions are now firmly established. That an assignment under the bankrupt law of a foreign country passes all the personal property of the bankrupt locally situate, and debts owing in England; secondly, that an attachment of such property by an English creditor, after such bankruptcy, with or without notice to him, is invalid to overreach the assignment; thirdly, that in England the same doctrine holds under assignment by her own bankrupt laws, as to personal property and debts of the bankrupt in foreign countries; fourthly, that upon principle all attachments made by foreign creditors, after such assignment in a foreign country, ought to be held invalid; fifthly, that, at all events, a British creditor will not be permitted to hold the property acquired by a judgment under any attachment made in a foreign country after such assignment; and sixthly, that a foreign creditor, not subject to British laws, will be permitted to retain any such property acquired under any such judg-

---

a 12 and 13 Vict. c. 106, § 184.

b *Ibid.* § 133; Attachment confirmed (by laws of Jersey), and act of bankruptcy same day. *Exp. Dobree*, 8 Ves. 83.

c *Ibid.* § 133.

d See MS. case cited in Locke on Attachment, p. 39.

e Story's Conflict of Laws, § 409.

ment if the local laws, however incorrectly upon principle, confer on him an absolute title.

The only question on foreign bankruptcy would therefore appear to be, respecting attachments made before the transfer under the bankruptcy, whether under the foreign bankruptcy the act or proceeding annuls all attachments upon the property of the bankrupt, and all inchoate liens though afterwards perfected; and whether it has any and what retrospective effect, or whether it merely vests the property of the bankrupt in the assignees, in the state in which it was at the moment of the proceeding whereby it became vested in them, and subject to its then existing liabilities.

By the specific provisions of the English Bankrupt Act[f], the plaintiff in the attachment cannot obtain more than a rateable part of the bankrupt's estate, but if in the foreign country no similar provisions exist, and the vesting be of all the property subject to its liabilities, although an attachment is only an inchoate lien, yet, as it becomes perfected by judgment and execution, and the proceedings then relate back to the time of the attachment made, it would appear that an attachment made before the transfer to the assignees, upon being perfected, would affect the property as from the date of the attachment[g].

In insolvency, the vesting does not appear to have been so retrospective in its effect; but it however appears clear that in order to prevent a debt from vesting in the assignees under the Insolvent Act[h] the insolvent must have ceased to be either legally or equitably entitled thereto[i].

A debt due to the insolvent will pass to the provisional assignee[k], although it has been assigned to a third party before

---

[f] 12 and 13 Vict. c. 106, § 133, 184.
[g] See *Exparte Dobree*, 8 Ves. 83.
[h] 1 and 2 Vict. c. 110, § 37.
[i] *Smith* v. *Keating*, 6 C. B. 136.
[k] *Buck* v. *Lee*, 1 Ad. and Ell. 804.

insolvent's imprisonment, if notice of such assignment were not given to the debtor before such imprisonment.

It will now be necessary to consider the question of property being attachable or not, on account of the person or office of any of the parties to the proceedings; thus, with regard to the Plaintiff, any disability which may exist as to his commencing an action for the recovery of any demand will disentitle him to any attachment, as an attachment is founded upon an action of debt; therefore if he cannot commence his action he cannot sustain an attachment.

With respect to the Garnishee, many persons are exempt from having any attachments made in their hands. Public ministers of foreign states, authorized and received by the sovereign of England, are exempt, as also their domestics and domestic servants; for although an attachment may not be a process contemplated by the Act of Anne [l], yet, as the only method of enforcing the attachment would be a *Ca. sa.* against the garnishee, his person would be touched, and therefore it would be within the provisions of the Act. Nor can an attachment be made out of the Mayor's Court in the hands of the Registrar or officer of the court; nor can it be made in the hands of the defendant himself [m], as it must be in other keeping than that of the defendant; nor in the hands of his domestic servant, or his carman or porter carrying his goods, because they have no possession independently of their master; therefore, where the defendant or his servant drives his cart, while driving it is not attachable, but if defendant or his servant put it up at an inn, and the innkeeper is liable for the safety of the property, then it is attachable in the hands of the

---

[l] 7 Anne, c. 12. A public minister cannot be sued in the courts of this country for a debt while he remains such public minister, even though neither his person nor goods are touched by the suit. *Magdalena Steam Navigation Company* v. *Martin*, 28 L. J. Rep. (NS.) Q. B. 310.

[m] See Sequestration, *post*.

innkeeper. Neither can an attachment be made in the hands of the defendant's clerk, but if the clerk carries on a business on his own account separate from that of his master (the defendant), and the defendant become indebted to him in his business, the circumstance of his being clerk to the defendant will not protect the property from an attachment, as the occupations are distinct, and the relation of master and clerk does not exist in the transaction upon which the debt arose; and it would appear that an attachment might be made in the hands of a partner of the defendant where accounts have been settled, and money is payable to the defendant from the partner on a statement of accounts between them. Property cannot be attached in the hands of government or its officers, though they may have money in their hands belonging to the defendant, for the crown is privileged against all customs; but if an officer, appointed by the government as a public agent, makes himself personally liable upon a contract made by him in that capacity for goods supplied to the use of the government, inasmuch as he could be sued by the person with whom he contracts [n], so an attachment can be made of the debt.

An attachment may be made in the hands of an attorney of the courts at Westminster [o], or in the hands of corporate bodies [p]; so also an attachment may be made in a man's own hands of the property of his debtor [q], but it must be so stated

---

[n] *Cunningham* v. *Collier*, 4 Douglas, 233; *Gidley* v. *Lord Palmerston*, 3 Bro. and Bing. 275; S. C. 7 Moore, 91.

[o] See authorities, note [w], p. 62.

[p] See the case of the Hamburgh Company, 1 Mod. 212. Locke on Attachment, 35.

[q] Bohun, 253, 267, 268, 468; Roll. Ab. tit. Cust. Lond. K; Viner, Ab. *ib. id.*; Bac. Ab. tit. Cust. Lond.; Mayor's Court Records. See *Smith* v. *Ridges*, Sir T. Jones, 165, Wallpool and King's case, 1 Leonard, 297, case 407; *Kerry* v. *Bowyer*, Cro. Eliz. 186. Note to case of *Harwood* v. *Lee*, Dyer, 196, case 42; *Hope* v. *Holman*, 1 Brownlow, 60. See *Anderson* v. *Kemshead*, 16 Beavan, 329.

on the record[r]. Attachments are also made in the hands of persons one or more of whom appear also as plaintiffs in the same attachment[s]. Such attachments appear to have been constantly made; the proceedings, so long as they remain in the attachment, being in the nature of an equitable inquiry, are not so strictly construed as if the same persons appeared as plaintiffs and defendants in the same action.

With regard to the Defendant, very few instances exist of the exemption of property from the custom on account of the person, as any person who is liable to an action in the Mayor's Court is liable under the custom, but if the court has in truth no jurisdiction by action over the defendant against whom a plaint has been entered in that court, the awarding process of attachment against a person having funds in his hands belonging to the defendant, as a means of compelling an appearance of the defendant to such plaint, is an excess of jurisdiction for which prohibition will lie[t].

Ambassadors or other public ministers of any foreign prince or state authorized and received as such in this country, and the domestics or servants of any such ambassadors or public ministers, are exempted from the custom, as they are not liable to have an action brought against them, and therefore an

---

[r] In the case of *Nonell* v. *Hullett*, 4 B. and Ald. 646, some doubt was thrown out whether such an attachment was good; but the authorities referred to in that case only show how the custom had been pleaded in other instances, and an inference is drawn that the custom would not warrant an attachment in a man's own hands. The error in the pleading, in *Nonell* v. *Hullett*, was that instead of pleading the custom to make an attachment in a man's own hands, the ordinary custom of making it in the hands of some third person had been pleaded, and it was therefore held that the custom as pleaded did not support the proceedings of the defendant in attaching the property in his own hands, for the custom as pleaded must always be shown to have been strictly pursued.

[s] Mayor's Court Records; and see *Anderson* v. *Kemshead*, 16 Beavan, 338.

[t] *De Haber* v. *Queen of Portugal*; *Wordsworth* v. *Queen of Spain*, 20 L. J. Rep. Q. B. 488.

attachment cannot be made of their property [u]. No privilege can be claimed against the custom, except as before spoken of. A peer of the realm [v] and members of parliament are not excluded, for the process of attachment not being an execution against the person their privilege does not exempt them from the custom; neither will the privilege of an attorney or other officer of the courts at Westminster, to be sued in his own court, exclude him from the custom, as the plaintiff cannot obtain the like remedy elsewhere [w].

A corporation is subject to the custom, and its property is liable to attachment [x]: so also are executors and administrators [y] within the custom, both as garnishees and defendants.

It is curious to observe in the history of foreign attachment that dead persons appear to have been made defendants either simply by their names, or by their names and describing them as deceased. This appears an anomaly; but, when the period of the establishment of the custom and the then method of trading is considered, it will be seen that there existed a neces-

---

[u] 7 Anne, c. 12. *Magdalena Steam Navigation Company* v. *Martin*, 28 Law J. Rep. (NS.) Q.B. 310.

[v] Appendix. See *Harris* v. *Lord Mountjoy*, 2 Leonard, 173, pl. 209; Countess Rutland's case, 6 Co. 52.

[w] *Ridge* v. *Hardcastle*, 8 T.R. 417; Turbill's case, 1 Saund. 67; 1 Sid. 362; 2 Keb. 346; 2 Leon. 156; Bohun, 268; and see 3 Dyer, 287 in margin.

[x] The Hamburgh Company's case, 1 Mod. 212, case 45; *Roupel* v. *Great Luxembourg Company*, 24 Law Times, 328; Viner, Ab. tit. Cust. London, E.; Locke on Attachment; *contra*, 2 Shower, 373, case 355. And see as to putting in bail privilege, *Harris* v. *Lord Mountjoy*, 2 Leonard, 173, pl. 209.

[y] Williams's Law of Executors, 1813; Bohun, Cust. Lond. 263, 268, 279; *Fisher* v. *Lane*, 3 Wils. 297; S. C. 2 W. Black. 834. See Bac. Ab., Roll. Ab., Viner, Ab., tit. Cust. Lond.; Com. Dig. tit. Att. See *Snelling* v. *Norton*, Cro. Eliz. 409; S.C. Noy, 53; S.C. 5 Co. 82 [b]. *Hodges* v. *Cox*, Cro. Eliz. 843; *Masters* v. *Lewis*, 1 Lord Raym. 56; S.C. Carthew, 344; S.C. 5 Mod. 76, 93; S.C. 3 Salk. 49; Carthew, 483; *Smith* v. *Ridges*, T. Jones, 165; *Spink* v. *Tennant*, 1 Roll. Rep. 105, 106.

sity for some means of recovering debts due by persons dying out of England, and this method presents a very ready even if it be somewhat rough justice; indeed it would have been difficult to establish a more apt method to enforce the payment of debts due by strangers dying either in or out of the jurisdiction. Traders from all parts of the country or from abroad came to the markets in London with their merchandize, and if they died even within the jurisdiction it would have been difficult to have obtained the payment of their debts except by some such practice, as no remedy existed at the time of the establishment of the custom for the recovery of debts from persons living or dying out of England, almost it might be said out of the city, but the property being attached, the executors or other persons interested in the estate were compelled to appear to the suit of the creditor.

Actions were also entered against the ordinary, as representing the person of the intestate[z] before the grant of letters of administration; or against the legal personal representatives by name, under that description, or barely "the "legal personal representatives of, *&c.* deceased, defendants," and attachments made thereon in the hands of any debtor to the deceased.

Attachments are now made against persons deceased as defendants, but are seldom made except as matter of precaution in cases where the executor or administrator is unknown.

---

[z] Probably the citizens had the same idea as expressed by a learned jurist, that the more pious thing was to pay the deceased's debts rather than leave the goods in the hands of the ordinary to pray for his soul; it has however been held that an attachment will not lie either against or in the hands of the ordinary, for a foreign attachment cannot charge any other person than the debtor himself, which the ordinary is not before the goods of the intestate come into his hands, for no creditor of the intestate can sue him until he hath actual seizin, and before such seizin he hath so little interest in the matter that he can neither release nor bring the action. *Masters* v. *Lewis*, 1 Lord Raym. 56; S. C. Carthew, 344; S.C. 3 Salk. 49; S. C. 3 Mod. 75, 92.

In cases of attachment made against deceased persons, or their legal personal representatives, or against executors and administrators as executors and administrators, as defendants, the property attached must have been due or belonging to the deceased at the time of his death, or to his estate unchanged by the executors or administrators, or it is not attachable, although the executor or administrator may be compelled to account for it as assets; that is, the property must continue unchanged in the deceased or his estate, the executors or administrators not having so dealt with it that it may have become the proper debt of the executor or administrator, for the plaintiff must show the property attached is the property of the testator, not merely that the executor was described as "A. B. executor, *&c.*," as that might be [a], although he was sued for his proper debt. Thus, if an executor sell the goods of the testator, the money cannot be attached as the property of the deceased [b]; nor if he take bond for money due to the testator can the money payable under the bond be attached [c]; nor if an executor recovers damages in trespass for the defendant's goods, or on a covenant made with him, can there be an attachment of the damages [d]; nor if money be awarded to an executor on a submission made by him of controversies between his testator and another person, can the money due on the award be attached [e]; but a promise to pay on forbearance is not sufficient to change the property, as if money be due to A. who dies, and the debtor promises, upon forbearance, to pay to his executor or administrator, it may be attached by a creditor of A. [f]: so where a

---

[a] Com. Dig. Att. D.; *Hodges* v. *Cox*, Cro. Eliz. 843.

[b] *Horsam* v. *Turget*, 1 Vent. 112.

[c] *Ib.* [d] *Ib.* [e] *Ib.*

[f] 1 Roll. Rep. 105; Roll. Ab. tit. Cust. Lond.; Com. Dig. Att. C.; *Horsam* v. *Turget*, 1 Vent. 112; Williams's Executors, 1813, 1814; Bac. Ab. tit. Cust. Lond. H.; Calthrop, 27. See *Harwood* v. *Lee*, Dyer, 196, case 42.

debt exist, though not due to the testator, but unchanged by the executor or administrator and such as an administrator *de bonis non* might sue for, this is attachable as against the executor or administrator, as for instance an amount payable on a policy of assurance on the life of the deceased.

Where there are no executors or administrators, or the executors named in the will are not known, or if known the will is not proved, an action is sometimes entered against some person as defendant, describing him as executor *de son tort, &c.*; this is mostly done as a precautionary measure, so that the property should not be removed from out the custody of the garnishee without notice to the plaintiff.

Mr. Williams, in his Law of Executors, says :—"Execu-"tors and administrators are within the custom of foreign "attachment, and therefore if a plaint be entered in the court "of the Mayor of London against an executor or adminis-"trator, the plaintiff may attach money or goods belonging to "the deceased in the hands of another within the city[h]; but "a debt due to the deceased cannot be attached on a plaint "against his personal representative, although he be sued "under that description, unless he be sued for a debt due from "the deceased[i]; nor shall there be an attachment for the debt "of a testator of money or goods in the hands of the executor, "unless they were due or belonging to the testator at the time "of his death, although they be assets; as if an executor sell "the goods of the testator, the money cannot be attached in "his hands[k]; nor if he take a bond due to the testator can the "money payable on the bond be attached[l]; nor if an executor

---

h *Masters* v. *Lewis*, 1 Ld. Raym. 57; S. C. 3 Salk. 49; Com. Dig. Attachment, B.; *Fisher* v. *Lane*, 3 Wils. 297; S. C. 2 W. Black. Rep. 834.

i Com. Dig. Attachment, D.; *Hodges* v. *Cox*, Cro. Eliz. 843; Toller, 478.

k *Horsam* v. *Turget*, 1 Vent. 113; S. C. 1 Levinz, 306; Com. Dig. Att. D.

l *Id. ibid.*

"recover damages in trespass for the testator's goods, or on a "covenant made with him, can there be an attachment of the "damages [m]; nor if money be awarded to an executor on a "submission by him of controversies between his testator "and another person, can the money due by the award be "attached [n]."

---

m *Horsam* v. *Turget*, 1 Vent. 112, 113; S. C. 1 Levinz, 306.

n *Id. ibid.*

CHAPTER III.

OF THE PLAINTIFF'S DEBT AND AFFIDAVIT.

No attachment is allowed to issue unless the plaintiff's claim is for a certain and due debt or demand [a], such a demand as may be recovered upon an action of debt in the courts at Westminster, or on the customary count of *concessit solvere* in the Mayor's Court, though an attachment is not permitted to be made upon every demand which may be recoverable upon this count.

The plaintiff's debt never comes in issue during any proceeding under the attachment; he is not bound to prove the existence of the debt alleged to be due to him from the defendant, nor to allege that it arose within the jurisdiction of the Mayor's Court [b], and the court will not inquire into it under any circumstances upon the trial of the issue in the attachment [c]; thus where a plaintiff, having omitted to insert his partner as co-plaintiff in the action and attachment, and the plaintiff, being called as a witness on the trial of the attachment, admitted that no debt existed from the defendant to himself alone, but only to himself and partner, the court refused to notice the circumstance, but left the defendant to his appearance in the action to take advantage of it. Neither would the court notice the evidence of the plaintiff admitting

---

[a] 1 Nel. Ab. 282, 283; *Dalton* v. *Selby's* case, 3 Leonard, 236; *North* v. *Winskell*, Lutt. 984; Roll. Ab. tit. Cust. Lond. G.; Viner, Ab. *ib.*

[b] *Westoby* v. *Day*, 22 L. J. Rep. (N.S.) 426.

[c] It is sufficient that the plaint was affirmed for a debt, without an averment that the debt arose within the jurisdiction of the court, 1 Vent. 236; Com. Dig. Att. I.: without showing the cause of the debt, Com. Dig. Att. I.

he was a minor, or the admission of the plaintiff that the amount sworn to was larger than the sum really due. To render the proceedings of the plaintiff secure as against the defendant, a cause of action should accrue to the plaintiff sufficient to give jurisdiction to the court to entertain the cause [d], otherwise the defendant might appear by bail in dissolution of the attachment, whereby the proceedings would become as an action of debt with special bail, and the defendant might then plead to the jurisdiction of the court; and if the court had no jurisdiction, the plaintiff's proceedings would be defeated thereby.

No attachment is allowed to issue except upon an affidavit substantiating the plaintiff's debt. Formerly it was the practice of the court to allow the affidavit of the plaintiff's debt to be made at the time of the plaintiff becoming entitled to judgment and execution [e]; but it is not unlikely that the permission to make the affidavit at so late a stage of the proceedings fostered attachments without any absolute debt existing in the plaintiff, or at all events on very doubtful demands, therefore no attachment has of late years been permitted to issue unless an affidavit be first made of the plaintiff's debt. The affidavit need not be made by the plaintiff himself, but it must set out the nature and particulars of the plaintiff's debt, and must state positively that the debt

---

d See Observations on Jurisdiction of the Mayor's Court.

e Bohun, 295. See also Isaac's History of Exeter, fo. 2 (Exeter has the same custom of foreign attachment as London). In an entry as early as 1201, it says "and when judgment is entered for the plaintiff before "the goods shall be delivered out of the court to him, he must first of "all swear to the truth of his said debt. And if the defendant afterwards make four several defaults, at the four several days to him given, "a *Sci. fa.* issues against the garnishee, and if he acknowledge the debt "from him to the defendant, and the plaintiff swears his debt from the "defendant, and finds pledges to return the money attached, if, *&c.*, the "plaintiff shall have judgment and execution of the money in the hands "of the garnishee." See Comyn's Digest, Att. A.

is due, whether it be made by the plaintiff himself or his attorney[f], or agent; executors[g] must swear to their belief. The affidavit must contain a full description of the deponent and the plaintiff, their residences and occupations, but it need not contain the residence or occupation of the defendant: It should contain the name or names in full of all the parties; thus, 'A. and others,' or 'A. and Company,' is not sufficient. When the full names are not known initials may be used, but the greatest particularity is requisite in the affidavit, because it is, so far as it extends, the foundation of the future proceedings, and not the slightest variation is permitted between the contents of the affidavit and the record, so far as they co-extend, except under an order to amend.

Should the plaintiff's demand consist partly of a debt for which an attachment will lie, and partly not, or if the plaintiff can only swear to part of his debt, the plaintiff may enter his action for the whole demand irrespective of the amount sworn to; for although in the attachment the plaintiff, as against the garnishee, cannot recover a greater sum than that sworn to, yet if the defendant appear and dissolve the attachment by bail, he must put in bail in the action in double the amount sworn to by the plaintiff, and they will be answerable to the plaintiff in the amount recovered against the defendant to the extent of the recognizances; the plaintiff may

---

[f] It appears formerly to have been the practice for the plaintiff to have sworn to his debt "by his attorney," Bohun, 288. It is a bad custom to swear the debt by the attorney; 1 Roll. Ab. I.; *North* v. *Winskell*, 2 Lutt. 985; *Pearse* v. *Calcott*, W. Jones, 406; *Leuknor* v. *Huntley*, Cro. Eliz. 713; Com. Dig. Att. A.

[g] Assignees of bankrupts, executors, and administrators are required only to swear to their belief, being as certain as the nature of the thing will bear, but nothing short of this is sufficient. *Sheldon* v. *Baker*, 1 T. R. 87; *Barclay* v. *Hunt*, 4 Burr. 1992; *Tonna* v. *Edwards*, 4 Burr. 2283; *Garham* extrix. v. *Hammond*, 2 B. and P. 298; *Swayne* v. *Crammond*, 4 T. R. 176; *Hobson* v. *Campbell*, 1 H. Bl. 245; *Roche* v. *Cavey*, 2 W. Bl. 850; *Reeks* v. *Groneman*, 2 Wils. 224; *Man* v. *Sheriff*, 2 B. and P. 355.

thereby, to some extent at least, obtain security for the payment of that part of his demand for which an attachment would not lie.

The plaintiff swearing to a certain sum "and upwards," as being due to him from the defendant, will not allow him to obtain in the attachment any larger sum of the garnishee than the certain and specified amount.

In cases of attachment of the property of a dead man, in an action against the executor or administrator, the debt for which the attachment is made must have been due from the deceased *tempore mortis suæ*, as for goods sold to or on acceptance of the deceased, or his bond, and not a debt from the executor, even testamentary or funeral expenses, or promises made as executor.

The affidavit is examined by the Registrar for the purpose of ascertaining the nature of the debt, and protecting persons from attachments being made upon their property for uncertain or unascertained demands; if he refuse to allow an attachment to be made, then the parties may apply to the court to allow the attachment to issue upon that or upon any fresh affidavit. Any irregularity or defect in the affidavit is subject to an application to the court for leave to file common bail in dissolution of the attachment, and it is never too late to make such an application upon notice, even after the attachment is in the list for trial, for no length of time, so long as the attachment exists, can operate as a waiver of the right to object; but if bail has actually been put in and justified, the attachment being dissolved, it is too late to object. Any irregularity, however, or want of form, though material, may be amended by a supplementary affidavit [h], but should the affidavit show upon the face of it a debt for which an attachment could not properly be made, then upon application the court will direct the attachment to be dissolved upon filing

---

[h] Locke, 5. See *Garnham* v. *Hammond*, 2 B. and P. 298.

common bail, and the court, where the defect does not directly appear on the face of the affidavit, will entertain a similar application, if the plaintiff's demand is really a question of damages to be ascertained.

As a general rule it may be said that if an affidavit states unequivocally the nature and amount of the plaintiff's claim, that the amount is due, and that it is a demand recoverable as before stated, it may be considered a good affidavit to found an attachment; they are not to be tested so severely as the affidavits to hold to bail, as the principal purpose of the affidavit here is merely to obtain an attachment to compel an appearance; and there exists a great difference between an affidavit which is intended to be the foundation of an arrest, and one to compel a party to come in and answer[i].

An affidavit of the plaintiff's debt, to found an attachment, may be made before the Lord Mayor or any one of the Aldermen, the Recorder, the Registrar of the Mayor's Court, or his Deputy; it may be made in any part of the United Kingdom, before a magistrate or officer who has a general power to administer oaths, and if he sign the jurat and affix his seal of office, it is sufficient; but in case he has not a seal of office, then his signature must be verified in the Mayor's Court by affidavit, stating that the person before whom the affidavit purports to be sworn is empowered to administer oaths, and further that the signature to the jurat is the signature of the person there designated, or that the deponent knows the signature of such officer or person who appears to have signed the jurat, and that he believes the same to be in his handwriting; but an affidavit made before a commissioner for taking affidavits, either in chancery or common law, for England, is not sufficient, as they have but a limited power by statute.

Affidavits made in foreign countries are sufficient to found attachments, but rather more formality is required than in

---

[i] See Erle, J. in *Wilding* v. *Temperley*, 17 L. J. Rep. (NS.) Q. B. 184.

those sworn in the United Kingdom. If sworn before a judge of a court of justice, then an affidavit stating the office held by such judge, and his authority, and a verification of his signature, is sufficient[k], but if sworn before an ordinary magistrate this should be attested by a notary public, or by any British ambassador, envoy, minister, *chargé d'affaires*, or secretary of embassy or of legation exercising his functions in any foreign country, or before a British vice-consul, acting consul, pro-consul, consular agent, consul-general, or consul; or the affidavit of the plaintiff's debt in the first instance may be sworn before any British ambassador, envoy, minister, *chargé d'affaires*, or secretary of embassy or of legation exercising his functions in any foreign country, or before a British vice-consul, acting consul, pro-consul, consular agent, consul-general, or consul, in which case, if the seal of office be affixed, no authentication of such seal or signature is necessary[l].

---

[k] *Dalmer* v. *Burnard*, 7 T. R. 251; *French* v. *Bellew*, 1 M. and S. 302; 2 H. B. 275; *O'mealy* v. *Newell*, 8 East, 364.

[l] 18 and 19 Vict. c. 42.

CHAPTER IV.

OF MAKING THE ATTACHMENT, AND OF THE ACTION, RECORD, AND PROCEEDINGS.

FOR the purposes of making an attachment none of the fictions already alluded to need be considered by the practitioner; his first step is to frame his affidavit [a], which must be submitted to and approved by the Registrar and then filed, together with a *præcipe* of the action, which is in the same form as in the ordinary action of debt [b], he must then fill up an attachment paper [c]. This is the warning to the garnishee, and it must contain, besides the names of the plaintiff and defendant, the names of all the persons supposed to hold the property, both christian and surnames; 'A. and others,' or 'A. and Company,' is not sufficient; care is necessary in this respect, as from the names of the garnishees inserted in this paper the record is made up [d]. This paper is sealed with the seal of the court, and must be delivered to the sergeant-at-mace for service. Where there is more than one garnishee the service upon one is sufficient service upon the whole, and it is immaterial where the garnishee resides so that he is within the city at the time of service. The service should be personal service, but in cases of bankers, merchants, and the like, a service of the attachment or summons upon the clerk is mostly adopted for convenience of the garnishee; and where a service has been effected in this method, and an admission be afterwards made by any person in the service of the garnishee that the garnishee had received the attachment paper,

---

[a] See cap. iii., Of the Plaintiff's debt and affidavit. For forms of affidavits, see *post*, Forms No. 1.

[b] See Form No. 2.

[c] See Form No. 3.

[d] As to amendment of names, see Amendment.

the court will not set aside a judgment signed thereon except upon an affidavit of merits, unless the garnishee swears that he not only was not served with it, but that it never came to his knowledge.

Immediately upon the service of this notice upon the garnishee, "all monies, goods, and effects" in his hands belonging to the defendant become subject to the attachment. No further proceeding can be had in the attachment until the fourth day (excluding Sunday) after the day of the service of the attachment, after two o'clock, on which day the plaintiff may issue his *Scire facias* [e], calling upon the garnishee to show cause why the plaintiff should not have execution of the property in his hands belonging to the defendant. Sometimes the garnishee appears upon the service of the attachment paper, without waiting the service of the *Scire facias*, in which case it is not necessary to issue the *Scire facias*; but the plaintiff cannot proceed any more rapidly on this account, as the *Scire facias* is supposed to be issued, and the recital of its issuing must be made upon the record; the appearance therefore of the garnishee before the return day of the *Scire facias* merely dispenses with the necessity of issuing it.

It will be observed that the attachment paper mentions generally "monies, goods, and effects," but in the *Scire facias* the property must be expressed in detail, as so many bales of wool, or boxes of figs, marked, *&c.*, inserting the marks if possible, so many cwts. of coffee, or so much money, naming the amount, or whatever the property or amount of money may be. The description should be as precise as possible, such a description as will not mislead the garnishee as to the precise goods intended to be included, and such a description as will ear-mark them as between the defendant and garnishee should the defendant subsequently sue him for them,

---

[e] See Form No. 4.

and he be compelled to plead the judgment and execution of the court, and prove the goods taken thereunder; the description of the goods may however be amended.

The *Scire facias* need not be issued on the day of the fourth default, but at whatever time it is issued it must bear *teste* on that day. The return day of the *Scire facias* must be at least the second day after its service, Sunday not counting, but it is returnable at ten o'clock, A.M.; thus a *Scire facias* served on the first may be made returnable on the third, but it need not be served upon the day upon which it is issued, and sometimes it is necessary to make a much longer interval than two or three days between the issuing and the return, where any difficulty may arise in the service upon the garnishee; this *Scire facias* must be sealed like the attachment paper, and also delivered to the serjeant for service. One *Scire facias* is sufficient both for money and goods [f].

If the plaintiff does not receive a notice of the appearance of the garnishee before two o'clock on the return day of the *Scire facias*, he may sign judgment [g]. If the garnishee appear [h] he has an imparlance, and therefore the plaintiff cannot proceed until the third day after the day of appearance, on which day he may deliver his copy record. The plaintiff however need not deliver his copy record until the garnishee rule him for that purpose, prior to the return of which rule he must do so unless he be desirous of having further time for that purpose, in which case, should any reason for it exist, he may apply to the court for an extension. This application is made in the usual form of applications to the court.

The record is a recital of all the proceedings from the entry of the action until the delivery of the copy record, with all the fictions relating to the attachment, and which proceedings are supposed to have been recorded from day to day; it com-

---

[f] Bohun, 259, 261.

[g] See Judgment by default.

[h] See Appearance of garnishee.

mences with the recital of the action [i]. The count *sur concessit solvere* [j] is the form of count usually adopted, as being a more comprehensive count than almost any other; but any count in debt is sufficient, or the *concessit solvere* and some other may be used, or an amendment may subsequently be made by application to the court, but it must always be in debt.

Immediately after the recital of the action the record proceeds:

> "And the said plaintiff by his said attorney prays process according to the custom, *&c.*, and it is granted, *&c.*, and thereupon it is commanded by the court to ———, one of the serjeants-at-mace of the said court, that he, according to the custom of the said city, summon by good summoners the said defendant to appear here in this court to answer the said plaintiff

---

i Proceedings in the Mayor's Court are commenced by plaint or bill original, without writ.

j Form No. 5. This is an action of debt upon simple contract, and lies by custom in the courts of the cities of London and Bristol, and the Great Sessions of Wales. Sti. 198, *Pascall* v. *Sparing*; see 1 Man. and Gr. 6. The present form of declaring in this action in London is, that the defendant, in consideration of divers sums of money before that time due and owing from the said defendant to the said plaintiff, and then in arrear and unpaid, granted and agreed (*concessit solvere*) to pay to the said plaintiff the said sum of, *&c.*, when and where the same should be afterwards demanded, yet, *&c.*, and this general form has been held good upon a writ of error. 1 Roll. Ab. 564, pl. 21; 2 Ld. Raym. 1432; *Story* v. *Atkins*; see 1 Wm. Saunders, 68, and authorities cited.

It lies in the courts of London by custom, for some pecuniary demands not ascertained, and for which *assumpsit* only will lie in the courts at Westminster. It was held until lately in the Mayor's Court, that whenever a declaration could be framed in the courts at Westminster, in which the plaintiff might recover for a cause of action arising *ex contractu*, he might recover on a *concessit solvere*; this doctrine has however lately been much narrowed. It is difficult to state the precise limit of the count, as succeeding Recorders have entertained different opinions upon it; it has been suggested that it lies whenever an action *ex contractu* will lie in a court at Westminster, provided the amount of the debt or damage can be ascertained by or through the agreement or contract between the parties, or the circumstances incident thereto, but probably the safer rule would be to consider it as a general *indebitatus assumpsit* count.

in the plea aforesaid, and that he return and certifie what, *&c.*; and afterwards (to wit) at the same court [k], the said serjeant-at-mace returned and certified to the said court according to the custom, *&c.*, that the said defendant hath nothing within the said city or the liberties thereof, whereby he can be summoned, nor is he to be found within the same; and at the same court the said defendant was solemnly called and did not appear but made default."

This does not absolutely take place; but the summoning, and the calling of the defendant, and his default, and the return of *nihil*, are necessary to be recorded, because an attachment without some default is bad [l]. No notice, however, need actually be given [m]; but if no statement of the default of the defendant be made upon the record, it will be fatal in error. It would appear that this proceeding against the defendant must be stated as a summons, and not as a notice; but the description as it appears upon the record is sufficient.

The next statement upon the record is the allegation by the plaintiff that some person owes money to or has property in his keeping belonging to the defendant, and a prayer of process to attach the defendant thereby. The approval of the affidavit by the Registrar may be said to be the permission given by the court to issue the attachment, *&c.*

---

[k] The summons being returnable at the same court at which it is made is not unreasonable or void; *Webb* v. *Hurrell*, *post*, p. 81, note s.

[l] *Bruce* v. *Wait*, 1 M. and G. 1; *Fisher* v. *Lane*, 3 Wils. 297; S. C. 2 W. Black. 834; *McDaniel* v. *Hughes*, 3 East, 372; S. C. 1 Scott, N. R. 81; *Westoby* v. *Day*, 22 L. J. Rep. (NS.) Q.B. 472; Anon. 1 Vent. 236.

[m] *Magrath* v. *Hardy*, 6 Scott, 627; S. C. 4 Bing. N. C. 782; S. C. 6 Dowl. P. C. 749; 2 Jurist, 594; 1 Arnold, 352; *Harrington* v. *Macmorris*, 5 Taunt. 232; S. C. 1 Marshall, 33; *McDaniel* v. *Hughes*, 3 East, 367; *Fisher* v. *Lane*, 3 Wils. 297; S. C. 2 W. Black. 834. In *McDaniel* v. *Hughes*, Lord Ellenborough noticed a difference between the reports of the case of *Fisher* v. *Lane*; but see *contra* Maule, J., in *Bruce* v. *Wait*, 1 M. and G. 39; S. C. 1 Scott, N. R. 81; see *Westoby* v. *Day*, 22 Law J. Rep. Q. B. 475; see *Tamm* v. *Williams*, 3 Douglas, 281; *Webb* v. *Hurrell*, 16 L. J. Rep. C. P. 187.

"And now at this same court it is alleged by the said plaintiff by his said attorney, that [A. B., the garnishee, owes to the said defendant the sum of £—— in monies numbered, as the proper monies of the said defendant, and now has and detains the same in his hands and custody; *or* A. B., the garnishee, has and detains in his hands and custody divers goods and chattels, that is to say, four bales of wool, marked respectively A. B. C. D., *or* numbered respectively 1, 2, 3, 4, as the proper goods and chattels of the said defendant."]

The amount of money or description of goods here inserted must be precisely in accordance with the amount and description inserted in the *Scire facias*, or the record will be irregular, and the delivery of the copy liable to be set aside.

"And therefore the said plaintiff by his said attorney prays process according to the custom, &c., to attach the said defendant, by the said [£—— *or* goods and chattels], so being in the hands and custody of the said [garnishee] as aforesaid, so that the said defendant may appear in this court here to be holden, &c., to answer the said plaintiff in the plea aforesaid; whereupon it is commanded by the court to the said serjeant-at-mace, that he, according to the custom, &c., attach the said defendant[n] by the said [£—— *or* goods and chattels] so being in the hands and custody of the said [garnishee] as aforesaid, and the same in his hands and custody defend and keep so that the said defendant may appear in this court here to be holden, &c., to answer the said plaintiff in the plea aforesaid, and that the said serjeant-at-mace return, &c."

The process here spoken of is the attachment served in the first instance upon the garnishee.

Although the allegation of the plaintiff that the garnishee owes money to the defendant is without any limitation as to the garnishee being within the city, yet, when he "prays

---

[n] It must be that the defendant was attached by the money, and not that the garnishee was attached by the money; Carthew, 282; Vin. Ab. Cust. Lond. L.

process," he prays it "according to the custom, &c.," which the court grants, and directs the serjeant in the same terms, *viz.*, that he, "according to the custom, &c.," attach the said defendant. The allegation of the plaintiff is general, because at the time of the entry of the action and grant of the attachment the garnishee perchance may not be and need not be within the city; whereas, if he allege that the garnishee was within the city at the time, it might raise the question of whether he was within the city at the actual time of the allegation or grant of the attachment. The prayer of the plaintiff however as above, and the direction of the court to the serjeant, that he, "according to the custom, &c.," attach the defendant, qualifies that which would otherwise appear in excess of the jurisdiction of the court, and it ensures that the power of the court and the custom is not exceeded. This method of stating it upon the record is sufficiently explicit for the Mayor's Court, for that court takes judicial notice of all the customs of London; they need not therefore be pleaded or appear on the record.

It is said that it is necessary that the plaintiff should allege that "one within the city owed to the defendant, &c." This allegation is unnecessary in the Mayor's Court for the reason before expressed, that as the court is aware of the customs of London, and takes judicial notice of them, and also of its own jurisdiction, it will take care not to exceed them, and therefore it is unnecessary to state them upon the record or other proceedings in that court; but if the record of the attachment in the Mayor's Court is examined it will be found that the plaintiff does not seek more than the custom warrants, because his allegation of the indebtedness of the garnishee and his prayer of process must be taken together, and he thereby states that the garnishee is indebted and prays process "according to the custom;" that is, that when the garnishee is found within the city he may be served with process. Upon this allegation and prayer, process is granted

according to the custom, which the court knows to be that the garnishee must be within the jurisdiction at the time of the service; but when the proceedings are before the courts at Westminster, which courts do not take notice of the customs of London except by certificate or plea, then the garnishee's being within the jurisdiction at the time of service must be pleaded, or it is fatal, as in *Hearn* v. *Stubbs*, Godbolt, 401. The objection was taken to the plea, "It showeth that the "goods were attached in the defendant's (garnishee's) hands, "but it does not show that it was within the liberties of the "city." The same objection as in the case as reported in Latch, 208, is "*Tiercement, n'est monstré que le detour* (garnishee) "*fuit deins le city al temps.*" This objection was also taken in *Crosby* v. *Hetherington*[o]. The custom as there pleaded was "that if it is or has been alleged by the plaintiff in the plaint "that any other person owes or has owed to any such defen- "dant any sum of money amounting to the debt in such plaint "specified or any part thereof, then at the petition of such "plaintiff it is and has been commanded by the court to one "of the serjeants-at-mace and a minister of the court to attach "such defendant in such plaint by such sum of money so being "in the hands or custody of such other person, so that such "defendant may appear," *&c.* The objection was taken that the custom alleged in the plea to attach a debt due to a defendant sued in the Lord Mayor's Court from any other person, without alleging such other person "to be or reside within the "said city," was bad. A *certiorari* was eventually directed to the mayor, *&c.* to certify whether there was such a custom as pleaded. The question was argued before the Recorder as assessor of the mayor and aldermen, and he certified that there was no such custom in London. The ground of the certificate was that there was no qualification as to the local jurisdiction within which the process ran, and that the custom as pleaded

---

[o] 5 Scott, N. R. 637; S. C. 4 M. and G. 933.

would intend that the serjeant-at-mace might proceed to any part of England to serve the attachment, and no such custom existed in London, for the serjeant must confine himself to the city and liberties [p].

It will be observed that the custom as pleaded in *Crosby* v. *Hetherington* is more extensive than that suggested upon the record of the attachment in the Mayor's Court, for in the record the serjeant is directed to attach the defendant "according to the custom," &c., but in the plea the effect of the words "according to the custom," &c., is omitted.

In a subsequent case [q], the custom was pleaded in precisely the same words as regards the allegation of the plaintiff that the garnishee owed money to the defendant; but under the prayer of process by the plaintiff according to the custom, &c., the words "according to the custom, &c." are amplified; it says "then at the petition of such plaintiff "made to the said court for process according to the custom "of the said city, that is to say, that such person so owing or "having owed such debt as aforesaid, being found within the "jurisdiction of the said court, may or might be warned by "the said serjeant-at-mace or minister of the said court, not "to part with such debt or sum of money so being in his "hands and custody," &c.

The record then proceeds with the serjeant's return to the said process:

> "And afterwards (to wit) at a court holden, &c., on (*a*) ———— aforesaid, the said plaintiff by his said attorney appears, and the said serjeant-at-mace returned and certified to the same court that he, by vertue of the said precept, on the [r]— day of ——— between the hours of —— and —— in the —— noon, had attached the said defendant by the said [£—, *or* goods

---

[p] See 1 M. and G. 25, note [s].

[q] *Webb* v. *Hurrell*, 4 Dowl. and L. P. C. 824; S. C. 4 Com. B. Rep. 287; S. C. 16 Law J. Rep. (NS.) C. P. 187.

[r] *Id. ibid.*

and chattels] so being in the hands and custody of the said [garnishee], and the same defended, &c., according to the custom, &c., so that the said defendant might appear at this court to answer the said plaintiff in the plea aforesaid."

(*a*) For instructions for filling up this form, see *post* forms.

The day of the attachment, and the hours between which the attachment was served, must be obtained from the serjeant-at-mace: a time is necessary to be stated[s], as questions often arise as to the time the garnishee may have parted with the money or goods, whether before or after an attachment, or in the event of other attachments out of the courts at Westminster.

The intervening days before spoken of, between the service of the attachment and the issuing the *Scire facias* are for four defaults to be recorded against the defendant, the fiction continuing that the plaintiff attended at four courts, and offered himself in the three last against the defendant, but the defendant making default in not appearing, each default is recorded against him.

"And thereupon the said defendant at the same court was solemnly called and did not appear, but made a first default, which said first default at the same court is recorded according to the custom, &c., and a further day is given by the court to the said defendant to appear at the next court to be holden, &c., on ———— the — day of ————; at which said next court, holden, &c., the plaintiff by his said attorney appears and offers himself against the said defendant in the plea aforesaid; and thereupon at the same court the said defendant was again solemnly called and

---

s The return must be within certain hours, for perhaps another attachment may be made in the hands of the garnishee, so that he hath no other way to avoid this other attachment but by pleading the former attachment made; Bohun, 254. A former attachment may however now be given in evidence under the *nil habet*, as the garnishee has no money applicable to the second attachment until the first is satisfied, and a garnishee cannot plead several matters.

did not appear, but made a second default, which said second default is recorded, *&c.*; and thereupon a further day is given by the court to the said defendant to appear at the next court to be holden, *&c.*, on ———— the —— day of ———— aforesaid; at which said next court, holden, *&c.*, the said plaintiff by his said attorney appears and offers himself against the said defendant in the plea aforesaid, and the said defendant was again solemnly called and did not appear, but made a third default, which said third default is recorded, *&c.*, and thereupon a further day is given by the court to the said defendant to appear at the next court to be holden, *&c.*, on ———— the — day of ————; at which said next court, holden, *&c.*, the said plaintiff by his said attorney appears and offers himself against the said defendant in the plea aforesaid; and thereupon the said defendant was again solemnly called and did not appear, but made a fourth default, which said fourth default is recorded," *&c.*

After the four defaults are recorded against the defendant, and on the same day as the fourth default, the record recites the issuing of the *Scire facias* to the garnishee already spoken of.

"And thereupon, after the said four defaults[t] recorded by the court against the said defendant in the plea aforesaid, according to the custom, *&c.*, the said plaintiff by his said attorney prays process, according to the custom, *&c.*, to warn the said garnishee, to be and appear in this court to show cause, *&c.*; whereupon at the same court holden, *&c.*[u], it is commanded by the same court to the said serjeant-at-mace, that he, according to the custom of the city, warn and make known to the said garnishee to be and appear here in this court to be holden, *&c.* on ———— the —— day of ————, to show cause, *&c.* why the said plaintiff ought not to have [execution of the said £—— *or* judgment of appraisement of the said goods and

---

[t] After four defaults a *Scire facias* issues; Com. Dig. Att. A.

[u] It is not sufficient to say it was at a subsequent court; Com. Dig. Att. I.; Roll. Ab. tit. Cust. Lond. See *Banks* v. *Self*, 5 Taunt. 238.

chattels] so attached in his hands and custody as aforesaid; and that the said serjeant-at-mace return and certifie at the same court, what, *&c.*; the same day is given by the court to the said plaintiff to be there, *&c.*, at which said court, holden, *&c.*, the said plaintiff by his said attorney appears; and the said serjeant-at-mace returned and certified to the same court that he, by virtue of the said precept to him directed, and according to the custom, *&c.*, had warned and made known to the said garnishee to be and appear at this same court, to show cause, *&c.*, as above commanded; and thereupon at the same court the said garnishee was solemnly called."

If the garnishee does not appear by two o'clock on the return day of the *Scire facias*, the plaintiff may sign judgment by default [v]; but it must be particularly borne in mind that as the garnishee is called at a court holden on the return day of the *Scire facias*, if the garnishee makes default it must be stated on the record, and the judgment signed upon such default; therefore, as no judgment can be antedated, the plaintiff must sign judgment on the return day of the *Scire facias*.

If the garnishee has appeared to the attachment before he has been served with a *Scire facias*, although it will be unnecessary to issue the *Scire facias*, yet it is necessary that it should be stated in the record as having been issued; in which case two days will be sufficient to insert in the record as between the *teste* and return. The record must then continue with the appearance of the garnishee, after the words "solemnly called [w]," and the plaintiff must add in the margin next to the action the plaintiff's warrant [x].

The record is now in a fit state to have a copy delivered to the garnishee, and if the imparlance has expired the plaintiff may indorse on the copy a demand of plea, which is a four-day demand [y], but this may be given afterwards.

---

[v] See Judgment by default.
[w] Form No. 6.
[x] Form No. 7.
[y] Form No. 8.

If the demand is indorsed on the copy record then the title of the cause need not be inserted; but if given separately it must.

If the garnishee do not plead on the expiration of the demand, judgment may be signed for want of plea[z]. If the garnishee plead, the plaintiff engrosses it upon the record, and if the garnishee's plea concludes "to the country," the plaintiff may add the *Similiter*, "and the plaintiff doth the like, there-"fore," &c. The cause is then at issue, and is treated, as to the setting it down for trial, issuing subpœnas, &c., as other issues in the court[a].

It may however here be stated that if the plaintiff do not set his cause down for trial within ten days after the cause is at issue, the garnishee may do so for the following court, and proceed to try by proviso, as upon other issues.

---

[z] See Judgment by default.

[a] See also Mayor's Court of London Procedure Act, 1857:

§ 23, Power of court to amend errors.
§ 24, Depositions of witnesses may be taken.
§ 25, As to compelling attendance of witnesses, production of documents, &c.
§ 26, Commission may issue to examine witnesses abroad.
§ 27, 28, 29, 30, Examination of prisoners and other witnesses, and costs of, &c.
§ 31, Restriction as to reading same.
§ 50, Compelling attendance of witnesses not in jurisdiction.

OF THE TRIAL.

1. *By Special Case, by Consent.*

By the 5th section of the Mayor's Court of London Procedure Act, 1857[b], the parties in any foreign attachment may, after issue joined, by consent, and by the order of the Mayor's Court, state the facts of the case, in the form of a special case, for the opinion of the Mayor's Court or of any one of the superior courts, and may agree that judgment shall be entered thereon for the plaintiff or garnishee, as the Mayor's Court or such superior court may think fit.

By section 6, when the opinion of such superior court shall be required, the Registrar of the Mayor's Court shall transmit such special case, under the seal of the court, to the Rule Department of the Master's Office of the superior court in which the case is to be argued; and thereupon all such proceedings shall be taken and rules and regulations observed, in the said superior court, as are usual with reference to cases stated for the opinion of such superior court in actions therein pending.

By section 7, the Registrar of the Mayor's Court, upon the production of an office copy of the rule of the superior court, made upon hearing the said special case, shall enter judgment in the Mayor's Court, in conformity with the decision of the superior court.

2. *Without a Jury, by Consent.*

By the 51st section of the Mayor's Court of London Procedure Act, 1857, the parties in any cause may, by consent in writing signed by them or by their respective attorneys, leave the decision of any issue of fact to the court, provided

---

[b] 20 and 21 Vict. cap. clvii.

that the court shall in its discretion think fit to allow such trial, or provided the judges of the superior courts shall, in pursuance of the power vested in them by law for such purpose, make any general rule or order dispensing with such allowance, either in all cases or in any particular class or classes of cases to be defined by such rule or order; and such issue of fact may thereupon be tried and determined, and damages awarded where necessary, in open court by the judge, who might otherwise have presided at the trial thereof by jury, and the verdict of such judge shall be of the same effect as the verdict of a jury, save that it shall not be questioned upon the ground of being against the weight of evidence; and the proceedings upon and after such trial as to the power of the court or judge, the evidence, and otherwise, shall be the same as in the case of trial by jury.

3. *With a Jury.*

Should the parties be desirous of trying the attachment with a jury, the entry of the cause in the ordinary manner in the office of the court is sufficient without any other notice to the Registrar, and the cause will appear in the list for trial.

The only issue at the trial is, whether the garnishee had any property in his hands belonging to the defendant liable to the attachment at the time of the attachment made, or at any time from that period to the time of the plea pleaded [c]. This is in some measure proving the case of the defendant against the garnishee, and when the parties to the suit could not give evidence great difficulty arose in the proof, and Bills of Discovery were often resorted to for the purpose of establishing the plaintiff's case; but now that the plaintiff can examine the garnishee as a witness, and the court can compel the inspection of documents, the issue is much easier to prove, and Bills of Discovery are seldom found necessary.

---

[c] See *post*, Garnishee's plea.

The proceedings at the trial are conducted after the manner of other issues, and the evidence of either party guided by the ordinary rules of evidence. All acts of the defendant, however, are received with great caution, and it may be said as a rule, that the proceedings of the defendant or his letters subsequent to the attachment are not evidence; and of letters purporting to have been written before, strict evidence must be given of the time of their being written, and even then such letters cannot, as of course, be received in evidence against the garnishee, even where he sets them out in an answer to a Bill of Discovery in which he admits himself to have received the property attached under the letters, and to have no other means of knowing to whom it belongs but by means of them. A receipt in full, given by the defendant to the garnishee before the attachment, is evidence.

Where an instrument is in the hands of the defendant, the plaintiff may read a copy in evidence without serving either the garnishee or the defendant with notice to produce the original.

The plaintiff is bound to prove the names of the garnishees and defendants; and formerly, when the power of amendment was not so great as at present, it was of much more serious consequence to obtain them correctly, as it was then held that a wrong name could not be amended, but evidence might still have been given that a garnishee was as well known by one name as another, for the misnomer not being pleaded, the plaintiff could not reply that fact as he might at common law. It was also held with respect to defendant that the plaintiff was not bound in every case positively to prove the christian names of all the defendants, if from circumstances (as coupling them with the rest of the partners in an acknowledged firm or otherwise) there was reasonable evidence to go to the jury of identity, or at all events the burden was upon the garnishee to prove the error; thus, where a defendant's name was Robert Villiers B., but he was sued as Robert B.,

was gazetted to a commission and entered in the garnishee's books as Robert B., it was held good.

Amendments of names, either of the garnishee or defendant, are now allowed either before or at the time of trial, but with the greatest caution, on account of the liability of the garnishee to the absent defendant and prejudice to any subsequent attaching creditor.

Too many or too few garnishees or defendants would, of course, be fatal if not amended; the amendment is in the discretion of the court.

In a notice to produce, the description of the documents desired to be produced is not expected to be so precise as in ordinary issues, on account of the presumed impossibility of the plaintiff's knowing the nature of the transactions between the garnishee and defendant; the description must, however, give the garnishee reasonably to understand that which is required to be produced. The admission of a garnishee of his having money in his hands belonging to the defendant is only *prima facie* evidence against him, and in case of an admission before the attachment, it ought to be near the time of the attachment made.

If the plaintiff suspects property to be in the garnishee's hands, but cannot obtain any evidence respecting it by an inspection of the books of the garnishee, or if the plaintiff believes that he cannot obtain it from the garnishee on the trial, the plaintiff may at any time before the actual trial of the attachment file a Bill of Discovery on the equity side of the Mayor's Court, to ascertain the trading and accounts between the parties, and what property the garnishee may have in his possession belonging to the defendant; but the defendant in equity need only declare the property in his hands at the time of the attachment made to plea pleaded, and may insist that he is not bound to answer further without demurring to the rest of the bill.

Where a defendant to a Bill of Discovery answers to all that

he is bound to disclose, and the bill has interrogated to matters which he need not answer, he is not driven to demur, but may insist in his answer that he is not bound to discover further than he has done.

To entitle the complainant to a discovery from the garnishee of the defendant's property in his hands, the Bill of Discovery need not set forth any title which would support a claim at law against the defendant; and the garnishee must answer the bill though it show the debt of the complainant to have arisen out of the jurisdiction of the court, or though it show no debt at all to be due. The bill operates as a stay of proceedings until the time for exception has expired.

The answer of a garnishee to a Bill of Discovery filed by one creditor in an attachment may be read on the trial of an attachment by another creditor, if the attachments were upon the same property.

The judge may, at the trial, reserve any question of law, and give either party liberty to move thereon, or he may take a special verdict.

VERDICT AND JUDGMENT FOR THE PLAINTIFF.

The plaintiff cannot obtain a verdict in the attachment for a greater amount than that sworn to in the affidavit of debt, whatever may be the amount of the plaintiff's claim or the sum in the garnishee's hands. The plaintiff upon obtaining a verdict is entitled to the record; if the *Venire* has not been entered it must be engrossed immediately after the *Similiter* [d], continuing with the *Postea*, according to the circumstances of the case [e].

The plaintiff in cases above 20*l.*[f] cannot have judgment

---

[d] Form No. 9. [e] Form No. 10.

[f] In cases where the plaintiff recovers 20*l.* or under, the plaintiff may obtain judgment on the day following the verdict.

until the third day after the verdict, as the garnishee may appeal [g]; but in the absence of any notice of appeal, the plaintiff may sign his judgment on the fourth day after the day of the verdict. Should the verdict be for money only, the plaintiff is entitled to final judgment; this judgment must be conditional that security is given to return the money attached, if the defendant disprove his debt within a year and a day [h].

1. *Final Judgment.*

Final judgment is signed by filing in the office of the court a docquet [i] containing the names of the parties, and the particulars of the proceedings; the judgment is entered upon the record [k] immediately following the *Postea*; the satisfaction [l] should also be entered on the record ready for signature, as upon signing the final judgment the record is filed in the court. The plaintiff must then give the names of the persons he proposes as pledges to restore. Should the verdict be for money and goods, the plaintiff signs final judgment as before for the money, but he can only sign judgment of appraisement [m] for the goods; so also if the verdict be for goods only. This is in the nature of an interlocutory judgment, because before final judgment to deliver goods their value must be ascertained.

2. *Judgment of Appraisement.*

All benefit received under the attachment by the plaintiff is placed to the credit of the defendant as against his debt to the plaintiff; therefore, if an attachment be made of goods, the exact value of the goods must be ascertained, in order

---

[g] Mayor's Court Procedure Act, 1857, § 8.

[h] Com. Dig. Attachment, F.; 1 Brownlow, 60; Lutt. 994. See Pledges to restore, Appearance of Defendant.

[i] Form No. 11.

[k] Form No. 12.

[l] Form No. 13.

[m] Form No. 14.

that the plaintiff's debt may be reduced by that amount, and this must be ascertained before the plaintiff receive them[n].

For this purpose, the plaintiff on signing his judgment of appraisement issues a precept to appraise[o]. This precept being delivered to the serjeant, he causes an appraisement to be made by two persons who should as a rule be freemen of London, though they need not be housekeepers; they must be persons of respectability, and by their trade competent to appraise the species of goods attached. The serjeant-at-mace has notice of the amount of the plaintiff's judgment, and therefore only permits the appraisement, which is made in his presence, of sufficient goods to cover that amount. If there are more than sufficient, and he cannot apportion the goods to the exact amount, then he selects such as taken together will come nearest thereto, and the plaintiff on receiving the goods pays the surplus into court on account of the defendant. Where the property attached may be one indivisible property, or when it cannot be separated without loss, as a machine, &c., then the whole is appraised and the surplus paid as before stated.

Should the property consist of boxes locked or packages fastened, the precept must direct the serjeant to open them and appraise the contents[p]. An inventory of the goods appraised, with the appraisement, is prepared by the plaintiff's attorney and returned into court[q]. Upon this return being made, the appraisers are sworn to the truth of the valuation, and the appraisement is entered on the record[r] immediately after the judgment of appraisement, and thereupon the plaintiff's attorney signs final judgment[s], after which the proceedings are as in ordinary cases of judgment for money.

---

[n] Cro. Eliz. 230; Com. Dig. Att. C.; Jor. Mallory, 318; W. Jones, 406; Ashley, 8.

[o] Form No. 15; Com. Dig. Att. C.

[p] Form No. 16.

[q] Form No. 17.

[r] Form No. 18.

[s] Form No. 19.

Should the garnishee have sold the goods [t], or if he refuse to allow them to be appraised, or if they be out of the city, the serjeant returns *Elongavit* to the precept [u].

OF THE PLEDGES TO RESTORE.

The plaintiff, after he has signed his judgment for money, or final judgment for goods, before he is entitled to issue execution, must find what are termed "pledges to restore," that is, a security taken by the court for the protection of the defendant [v]; inasmuch as the plaintiff's debt is not proved in any stage of the proceedings, it not being, as we have seen, in issue in the attachment, the court guards the rights of the absent defendant by taking good security on his behalf, that in case he should be enabled at a future period to disprove or avoid the plaintiff's debt [w], he should have the money or the value of the goods recovered in the attachment refunded to him. The pledges are two housekeepers, but they need not be freemen of London, or reside in any particular locality, but they must be persons of sufficient responsibility for the amount for which they are proposed.

A notice containing the names, addresses, and occupations of the persons so proposed as pledges is left with the Registrar for two days, and inquiry is made by him as to their responsibility; if they are responsible the Registrar accepts them, if he do not deem them responsible he rejects them, and others may be offered; if, however, the plaintiff is dissatisfied with the rejection he may give notice, and the pledges may appear and justify in open court before the Recorder. If the pledges are accepted by the Registrar they attend before him, and, being identified by the plaintiff's attorney, they enter into a

---

[t] *Ante*, p. 10, Custom generally. [u] *Post, Elongavit*, cap. ix.

[v] Sureties must be found; *Hope* v. *Holman*, 1 Brownlow, 60.; Lutt. 994. See Custom, Appendix.

[w] See cap. vi., Of the Appearance of the Defendant.

recognizance jointly and severally that if the defendant shall come into court within a year and a day according to the custom (the year and a day commences from the execution [x]), and disprove or avoid the plaintiff's debt, that the plaintiff shall restore to the defendant the condemnation money, or so much thereof as shall be adjudged by the court, or in default thereof they will do it for him. In case the attachment is for goods, then the recognizance is for the amount of the appraisement.

Upon the recognizance being entered into, a certificate of the judgment having been signed, and the pledges found, is granted by the Registrar, and the plaintiff is entitled to issue his execution.

The pledges to restore are in the nature of bail to pay, as they cannot discharge themselves by a render of the plaintiff. These pledges are liable only for the amount of the condemnation money, and not for any costs incurred by the defendant in the action of the plaintiff should the defendant appear under the *Sci. fa. ad disprobandum debitum.*

If the pledges to restore are found insufficient, and upon inquiry they appear to have been so at the time they were taken, upon petition to the court, and proof of their insufficiency, the court will direct the Registrar personally to make amends to the party for taking insufficient pledges; inasmuch, however, as great difficulty may exist as to the exact responsibility of the Registrar, the following is the rule upon the subject:

"In any case, if the Registrar at the time of taking the "pledges to restore do not make proper inquiries as to their "sufficiency, and accept pledges insufficient at the time of "their being taken, he shall, on petition to the court, be com-"pellable to recompense the party for such insufficiency if "the court shall so see fit."

---

[x] See *ante*, p. 17.

OF THE EXECUTION AND SATISFACTION.

After the pledges have entered into their recognizances, the plaintiff obtains a certificate thereof from the Registrar, and issues his writ of execution, which should be tested on the day of the judgment.

It is necessary that an execution should be issued and executed, as any payment short of a compulsory payment under the execution is a voluntary payment, and will not discharge the garnishee against the defendant of the amount he pays [y]; but the payment under the execution to the serjeant-at-mace is a discharge of the garnishee as against the defendant, although the plaintiff have not received the money, but it remains in court on behalf of the defendant, in case he dissolve the attachment before the plaintiff sign satisfaction.

The execution [z] after it is sealed must be placed in the hands of the serjeant with the certificate [a].

The serjeant under the execution receives the money and pays the amount into court.

The plaintiff must attend at the office, and being identified may sign satisfaction; this is, an acknowledgment of satisfaction to the amount received under the execution, upon signing which the amount in court is paid out to him or his attorney.

This entry of satisfaction is necessary to complete the at-

---

[y] *Wetter* v. *Rucker*, 4 J. B. Moore, 172; S. C. 1 Brod. and Bing. 491; *Crosby* v. *Hetherington*, 4 M. and G. 933; 5 Scott, N. R. 637; 1 Roll. Ab. Cust. Lond.; Bohun, 280; *Magrath* v. *Hardy*, 4 Bing. N. C. 782; *Webb* v. *Hurrell*, note q, p. 81; Com. Dig. Att. H.; *Roberthon* v. *Norroy King at Arms*, 1 Dyer, 82; *Westoby* v. *Day*, 22 L. J. Rep. (NS.) Q. B. 426; Ashley, 81.

[z] Form No. 20.

[a] In case of any length of time elapsing between the attachment and judgment, or execution, the Registrar will require an affidavit of the debt being still due before he permits judgment to be signed or execution to be issued.

tachment, as, until this is done, no acquittal of the defendant appears of the amount recovered by the plaintiff, and this must appear on the record [b]. Until satisfaction is signed the defendant may appear and dissolve the attachment, even if the money be in court under the execution, in which case the money will be paid out to the defendant [c].

If the execution be for goods, the garnishee pays the appraised value, or hands to the serjeant the goods appraised, and he holds them for the plaintiff. The court requires sometimes before the execution is issued an undertaking on the part of the plaintiff to accept the goods out of court, when the holding by the court would be inconvenient.

If the garnishee do not deliver the goods the serjeant arrests the garnishee, who is released upon payment of the appraised value.

VERDICT FOR GARNISHEE.

In an attachment, the issue is whether the garnishee held any and what property of the defendants between the date of the service of the attachment and plea pleaded therein. This issue being once tried the same point cannot again arise, as the garnishee of course cannot be served with the attachment on the same day, and if the same issue were to remain open, the garnishee never could part with the property if liable to have the same issue retried; there is therefore no nonsuit; in all cases the jury give a verdict.

If the plaintiff in the attachment seek to recover upwards of 20*l.* he has two days to appeal [d]; if no notice of appeal is

---

[b] 22 Edw. IV. 30[b], Boh. 259; 1 Leon. 321; Com. Dig. tit. Att. E.

[c] See cap. vi., Appearance of Defendant.

[d] See *post*, Appeal. If plaintiff in the attachment sought to recover 20*l.* or under, and the court has not given him leave to move under § 10 of the Mayor's Court Procedure Act, the garnishee may sign judgment the day after the verdict.

given the garnishee is entitled to the record, and if the *Venire* of the jury[e] is not entered, it should be engrossed on the record immediately after the *Similiter*, then the finding of the jury according to the circumstances[f], and concluding with the judgment[g]; a docquet[h] must then be prepared, and judgment signed in the office of the court.

---

[e] Form No. 21.
[f] Form No. 22.
[g] Form No. 23.
[h] Form No. 24.

CHAPTER V.

OF THE APPEARANCE OF THE GARNISHEE, AND OF HIS PLEA.

We have seen that the first process served upon the garnishee is merely a notice or warning to him not to part with any property which he may have in his custody belonging to the defendant; this notice does not require any appearance to be entered by the garnishee.

The next process, the *Scire facias*, directs the garnishee to appear at the court therein mentioned, to show cause why the plaintiff should not have execution of the property therein specified. Upon the service of this process the garnishee must determine whether he will appear and defend the attachment, or suffer judgment to be signed against him by default.

A garnishee is not bound to appear and defend any attachment, provided the property in his hands belongs to the defendant and is liable to be attached under the custom, as no act of the garnishee subsequent to the attachment can have any retrospective effect so as to defeat it; therefore, where no defence exists to the attachment, if the garnishee appear he merely puts both himself and the plaintiff to unnecessary expense, as a compulsory payment under a judgment by default is as good a defence to any action brought against the garnishee by the defendant for the property attached, as that of a judgment upon a verdict[a].

The garnishee, before he suffers judgment to go against him by default, should be certain that the property attached is the property of the defendant, and that, so far as the garni-

---

[a] *Webb* v. *Hurrell*, note q, p. 81. See *Westoby* v. *Day*, 22 Law Jor. Rep. (NS.) Q. B. 418; S. C. 2 E. and B. 621.

shee is aware, there is nothing which will exempt it from the operation of the attachment; the garnishee should also take care of any prior attachments on the same property in his hands, because each attachment becomes a lien on the property according to the priority of service, and this priority is not lost in any attachment except the plaintiff therein has committed laches in proceeding to trial. Where there are several attachments against the same defendant, the garnishee must apply each attachment according to its priority to the property in his possession, having regard to the amount of the debt sworn to by the plaintiff, beyond which amount the plaintiff cannot recover in the attachment. If the precepts of *Scire facias* differ in their description of the goods in the garnishee's possession as to their species or quantity, the garnishee must still apply each attachment according to its priority to the goods so respectively described in each *Scire facias*; the garnishee will thereby see to what extent he may suffer judgment to be signed against him by default in any individual attachment, as if an attachment is made for money only, a second in priority of date for wool, and a third for money; the garnishee having money and wool in his possession, he may suffer judgment by default in the second attachment for the wool notwithstanding the first; but he must not do so in the third unless he has sufficient money to cover the first as well as the third.

The garnishee should however be careful to see what property the *Scire facias* charges him with having in his possession, because judgment may be signed by the plaintiff for whatever amount of property is stated in the *Scire facias*, and not merely the amount of property the garnishee may possess. If therefore the garnishee is summoned by the *Scire facias* for a greater amount of property than he has in his hands, or for money and goods when he has only one or the other, then he must appear unless the *Scire facias* be amended, or the plaintiff undertake to sign judgment for the correct amount,

or the plaintiff issue a fresh *Scire facias* [b]. If the garnishee have a lien upon the property in his hands, and the amount is admitted by the plaintiff, judgment may be signed for the property subject to the lien, without the garnishee appearing.

Should the garnishee have any doubt whether the property is the property of the defendant, or whether it is applicable to the attachment, then it is advisable for him to appear and defend [c], whereby he has the opinion of the court as to the law, and that of the jury as to the facts in the case, which is the best security he can have against any proceeding of the defendant. These are the only points to be considered by a garnishee; he need not consider the transactions between the plaintiff and defendant, either whether the plaintiff's debt arose within the jurisdiction of the Lord Mayor's Court, or whether there exists any debt whatever due to the plaintiff [d]. The garnishee is supposed to be, and in all probability is, in entire ignorance of the transactions between the plaintiff and defendant.

If the garnishee is desirous of appearing to an attachment, he must enter his appearance in the office of the court by *Præcipe* [e], and notice thereof must be given to the plaintiff's attorney before two o'clock on the return day of the *Scire facias.*

---

[b] It appears that formerly a garnishee sometimes appeared and admitted the possession of property, describing it, and judgment was thereupon given by the court for that amount; and in the present day, if the garnishee do not wish to defend the attachment, except to protect himself upon the ground of being charged with having in his possession more property than he really has belonging to the defendant, there does not appear any objection to the adoption of this course of proceeding; but it appears to be needless when the *Scire facias* charges him with having an amount of property not exceeding that which he really possesses, or where the *Scire facias* can be altered for the purpose of rectifying the amount, or where the plaintiff undertakes to make up his record and sign judgment for the smaller amount, as no collusion can be charged against the garnishee on that account.

[c] See *ante*, p. 13, 41, 56.

[d] *Westoby* v. *Day*, note [a], p. 98.

[e] Form No. 25.

If the garnishee has appeared, but is not desirous further to defend the attachment, he may allow judgment to be signed against him for want of a plea.

The plea now used by a garnishee is the general issue, a general denial of the possession of any property belonging to the defendant, or, of owing to him, any money[f]. Under this plea, as a rule, the garnishee may give in evidence whatever he might have pleaded or given in evidence in answer to an action to recover the property brought against him by the defendant at the time of making the attachment; and although the issue under the custom is whether the garnishee had at the time of the attachment, or at any time from that time to the time of the plea, any property of the defendant in his possession applicable to the attachment, yet, inasmuch as the proceedings are equitable proceedings, the court will allow the garnishee to prove under the plea any matter arising subsequently to the attachment, which by reference to a time anterior to the attachment will divest the property out of the defendant, or raise a compulsory duty on the part of the garnishee to apply the property to other use than that of the defendant notwithstanding the attachment; as any contingency happening subsequent to the attachment, whereby the garnishee may have become liable to pay a sum of money to a third person on account of the defendant, in pursuance of a promise of the garnishee made before the attachment at the request of the defendant, or the bankruptcy or insolvency of the defendant subsequently to the attachment, or the destruc-

---

[f] See *McDaniel* v. *Hughes*, 3 East, 373; *Westoby* v. *Day*, 22 Law Jor. Rep. Q. B. 426; S. C. 2 E. and B. 605; *Webb* v. *Hurrell*, 16 Law Jor. Rep. C. P. 192; S. C. 4 D. and L., P. C. 824; S. C. 4 Com. B. 287; Ashley, 8; Bohun, 261. It is said in *Masters* v. *Lewis*, as reported in 1 Lord Raym. 56, that a garnishee may plead whatever a defendant might have pleaded; but this dictum appears without any object or reference to the question in issue; and although the same case is reported by four other reporters, no mention is made of this proposition by them. See S. C. 3 Salk. 49; Skin. 516; 5 Mod. 76, 92; Comb. 347. Form No. 26.

tion by fire of the goods of the defendant in the possession of the garnishee, the garnishee holding the goods at the risk of the defendant.

The garnishee cannot plead several matters under the statute of 4 Anne, c. 16, as that statute does not apply to attachments; but he may plead specially anything which he might have pleaded in answer to an action brought against him by the defendant in the courts at Westminster at the time of the attachment, or anything in reference to his possession of the property which may create a defence to the attachment; as an assignment of the debt due to the defendant from him with notice to him of such assignment before the attachment, or the bankruptcy or insolvency of the defendant either before or after the attachment, or he may plead in delay of the judgment and execution, where the attachment is of the price of goods sold, that the credit for the goods has not expired [g]; but the garnishee cannot put in issue the plaintiff's debt, because under the custom, in the absence of the defendant, the plaintiff is not bound to give any evidence respecting his debt, therefore the garnishee cannot put it in issue by his plea, neither can he raise the question whether it arose within the local jurisdiction of the Mayor's Court [h]. Indeed it would be a very dangerous thing in the absence of a defendant to allow a garnishee, who must necessarily be but imperfectly, if at all, acquainted with the transactions between the plaintiff and defendant, to raise any issue upon the plaintiff's debt, as it might materially prejudice the defendant even without collusion, but with collusion it will readily be seen how a plaintiff might obtain a judgment against a defendant, while in truth no debt existed.

If any event occur after plea which may give to the garnishee a good defence to the attachment, there does not appear

---

[g] See also *post*, Form No. 27.

[h] Ashley, 8; *Lex Londinensis* (1680), 20; Bohun, 255; *Westoby* v. *Day*, note [a], p. 98; *McDaniel* v. *Hughes*, 3 East, 373.

any reason why the garnishee should not plead it *puis darrein continuance*, as the destruction of the goods of the defendant as before mentioned, or the bankruptcy or insolvency of the defendant, or the defence may be raised by suggestion on the record.

All debts of the garnishee to the defendant, and all money and property in the garnishee's hands at the time of the attachment made, and all debts incurred and accruing due, and all monies and property coming into his hands at any time between the attachment and the plea, are by the custom liable to the attachment; but no debts incurred, or money or property coming to the garnishee's hands subsequently thereto, are in any way affected by it[1].

See further, as to the plea of a garnishee, Form No. 27.

---

[1] See Roll. Ab. tit. Cust. Lond. G.; Com. Dig. Att. C.; Ashley, 6; *Lex Londinensis*, 34, 36; Bohun, 255, 261; *ante*, p. 67; and see authorities, note [d], p. 25. There can be little doubt that at the time pleadings were oral, the garnishee, after the warning not to part with any property of the defendant, received a similar summons to the *Scire facias* according to the present practice, to appear and show cause why the plaintiff should not have execution of the property, at the return of which summons both he and the plaintiff personally appeared in court, and the matter was thereupon inquired into and judgment given, up to which time the garnishee must have been held responsible for all property of the defendant's in his custody; but since pleadings have been reduced to writing, and suitors represented by attorneys, the appearance of the plaintiff and garnishee has become a mere minute upon the record; while the plaintiff's declaration or statement of his case in writing, and the plea of the garnishee, are equivalent to the issue heard in court on the return of the summons of the garnishee, as before spoken of, and upon which judgment was then given; and therefore the garnishee is liable in the attachment for all property in his possession up to the time of his plea. This would appear to be the solution of the peculiar circumstance of a garnishee being so answerable, and as the judgment was given at the same court as the appearance, why it is said the garnishee is liable to account in the attachment for all the property coming to his hands up to the time of process against him.

CHAPTER VI.

OF THE APPEARANCE OF THE DEFENDANT,

I. In Dissolution of the Attachment.
   1. *By Bail.*
   2. *By Render.*
   3. *By Payment of Money into Court.*

II. Upon Writ of *Scire facias ad disprobandum debitum.*

I. IN DISSOLUTION OF THE ATTACHMENT.

AN attachment, as we have seen, is a process merely to compel the appearance of the defendant in an action brought against him; therefore, upon his appearance becoming perfected according to the custom, the attachment and all the proceedings thereupon become void, and the action becomes an action against the defendant, with security[a] by bail or otherwise for his appearance.

Upon the appearance being perfected a certificate is granted by the Registrar to that effect, and the garnishee becomes in the same position towards the defendant that he was prior to the attachment being made, and he is bound to deliver up the property to the defendant or to hold it to his order; but, as all the proceedings in the attachment have become void and the garnishee is no longer in court, no summary remedy exists to compel him to deliver them[b]. A defendant may appear in the action in dissolution of the attachment at any time before

---

[a] *Andrews* v. *Clerke*, Carthew, 26; *Blanchard* v. *De la Crouée*, 16 Law Jor. Rep. (NS.) Q. B. 181; S.C. 9 Q. B. Rep. 869; Ashley, 117; Bohun, 257; Com. Dig. Attachment, A.

[b] See *Leveridge* v. *Wiltshire*, 12 Modern, 213.

the plaintiff has acknowledged satisfaction [c]; the appearance may be by any of the methods hereafter spoken of; but after the acknowledgment of satisfaction a defendant cannot dissolve the attachment [d], because the satisfaction is a receipt by the plaintiff of the property recovered under the attachment, and a discharge of the defendant upon the record of his debt due to the plaintiff, so far as the amount recovered will extend; but until this is perfected the defendant remains undischarged, and still liable to the plaintiff, the payment of the defendant's debt by the third party not being complete, and therefore the defendant is permitted to appear in dissolution; and even if execution should have issued against the garnishee, and he be in custody thereunder, yet, immediately the appearance of the defendant is complete, the garnishee must be discharged [e]; and if the money under the execution has been received by the serjeant and paid into court, yet, if the defendant perfect his appearance before the plaintiff has signed the satisfaction, the attachment is dissolved, and the defendant is entitled to the money.

When there are several actions and attachments against the same defendant he may appear in any one or more of the actions, and dissolve the attachments made thereon without appearing in any other action; but if there be only one action, with several attachments made thereon, he cannot appear in dissolution of some of the attachments and leave others in existence, because the appearance being an appearance in the action, it dissolves all the attachments made upon it. If a plaintiff bring two actions for the same demand, and make attachments upon each action, the defendant may appear in one action without appearing in the other; in the latter case, an appearance in one action will be sufficient to allow the de-

---

[c] Bohun, 257, 260; Com. Dig. Attach. E.; *Lex Londinensis*, 33; Ashley, 9.

[d] Bohun, 259; Ashley, 9.

[e] Bohun, 257; Repertory Josselyn, 148; Jor. Frowick, 69 [b]; *Lex Londinensis*, 33; *Lewis* v. *Wallis*, Sir T. Jones, 222.

fendant to apply to the court to compel the plaintiff to elect in which action he will proceed; but as a rule, the Mayor's Court will not entertain a motion or other proceeding on behalf of a defendant to take advantage of any error or irregularity in the action or attachment before he has given bail or security to bring himself into court.

There are three methods in which a defendant may appear in dissolution of an attachment: 1. By Bail; 2. By Render; 3. By payment of Money into Court.

1. *By Bail.*

Bail in dissolution of an attachment must of course be special bail, that is, bail to render[f] the defendant, if the plaintiff recover judgment in the action.

Two persons only are, as a rule, allowed as bail for a defendant, but the court will upon application permit a greater number where circumstances may require it. The persons proposed as bail must be housekeepers, rated, and paying rates and taxes, but they need not be housekeepers within the city, neither need they be freemen of London.

When a defendant is desirous of putting in bail, he must give the plaintiff's attorney a notice in writing[g] of his intention to do so; the notice must contain the names of the persons proposed as bail, the description of their profession, occupation, or calling, together with the number of the

---

[f] *Lex Londinensis*, 33; Bohun, 257, 259, 260; Ashley, 9; *Andrews* v. *Clerke*, Carthew, 26; 12 Modern, 213; *Day* v. *Paupiere*, 18 L. J. Rep. Q. B. 271; S. C. 14 Jurist, 40; S. C. 7 D. and L. 12; *Lewis* v. *Wallis*, T. Jones, 222. See note [a], p. 104.

The bail must be special bail, although the defendant be an executor or administrator; *Bastow* v. *Gant*, 21 L. J. Rep. (NS.) Q. B. 377; S. C. 13 Q. B. Rep. 807, note.

Semble a company must also give bail; for although the company cannot be rendered, so also a peer cannot be rendered, yet he must give bail, for it is in two parts, to render or pay the money; Lord Mountjoy's case, 2 Leonard, 173, case 209.

[g] Form, No. 28.

house, and the name of the street or place where each of the persons so proposed resides, and it must state, in addition, that the persons named will attend at the office of the court on a day and at a time mentioned therein, between the hours of twelve and two o'clock, to enter into the required recognizances, and there to justify for the purpose of becoming bail and dissolving the attachment.

Any omission or irregularity in this notice, in not containing the particulars required, or such a misdescription of the persons proposed as bail as might mislead the plaintiff, will form a good objection to the justification.

This notice must be served in time to give the plaintiff two clear days, exclusive of Sundays, before the day mentioned for the attendance of the proposed bail, for the purpose of inquiring into their sufficiency; a greater interval than two days may be made, unless the plaintiff be thereby delayed in obtaining the condemnation money, in which case, if a greater interval than the beforementioned two days is made, the notice will be void. Further time beyond the two days mentioned may be obtained, upon application to the court by the plaintiff, to inquire into the responsibility of the bail, should circumstances require it.

At the time mentioned in the notice the proposed bail should attend at the office of the court; in the event of their failing to do so within half an hour from that time the plaintiff may enter an objection with the Registrar, and no justification will be permitted without a fresh notice.

If the plaintiff do not attend in like manner, the persons proposed as bail will be permitted to justify; and upon an affidavit of the service of the notice upon the plaintiff's attorney, a certificate of the dissolution of the attachment will be granted by the Registrar. This notice should, as a rule, be served personally upon the plaintiff's attorney or his clerk, and, in the event of its not being so served, some valid reason must be assigned in the affidavit for the departure.

If the persons proposed as bail attend, the plaintiff may oppose them by *vivâ voce* examination, and may also use affidavits relative to their circumstances, or to inquiries made respecting them. In opposing bail they may be asked any questions respecting their qualification as housekeepers, *&c.*, and the nature and amount of their property to the extent of the sum for which they are required to be answerable, but no further; and questions are not allowed to be asked which will necessarily expose the circumstances of the bail or other persons.

The bail must each be worth double the amount of the plaintiff's debt as sworn to in the affidavit, unless that amount exceed 1000*l.*, in which case it is sufficient if they are each worth 1000*l.* beyond the amount sworn to, but this must be over and above any other amount for which they may be liable as bail in any other action, and a sum sufficient for the payment of all their just debts.

The bail should be in a position which will reasonably justify any person in the supposition that at the time the plaintiff may obtain judgment they will be continuing in their profession or occupation, and at some place readily to be ascertained by the plaintiff.

The recognizance is joint and several, that if the defendant be condemned in the action at the suit of the plaintiff, they will have the body of the defendant forthcoming at the end of the suit, or pay what shall be recovered against him [h].

If the plaintiff's debt, as sworn to, exceed 1000*l.*, then the recognizance is in 1000*l.* over and above the amount sworn to, beyond which amount the bail are not liable, whatever may be the amount of the judgment recovered against the defendant.

It is unnecessary to state who are competent to become bail, the rules attending special bail in general are applicable;

---

[h] Ashley, 7; Com. Dig. Att. E.; *Lewis* v. *Wallis*, 2 Jones, 222.

it may however be mentioned, that attornies and attornies' clerks, and officers of the Mayor's Court, are incompetent.

Notice of bail in dissolution forms no stay of proceedings in the attachment with the exception of the payment of the condemnation money to the plaintiff. If the money be in court, and the persons proposed as bail do not justify, the plaintiff may acknowledge satisfaction, and receive the money out of court. If, however, before the plaintiff acknowledge satisfaction, a second notice of bail is served, this second notice will form a stay of proceedings in the same manner as the first; but if the proposed bail on the second notice be rejected, or do not justify for any cause, the plaintiff may sign satisfaction and receive the amount, and no further notice of bail will form any bar to his receiving it; if, however, the plaintiff delay signing satisfaction until after bail have justified, under a third or other notice, the attachment is dissolved, and the defendant will become entitled to receive the amount on an application to the court.

If notice of bail has been twice given, and the bail have not justified in either instance for any cause, the court will not in general allow any bail upon a third or other notice to justify, except upon payment of costs to the plaintiff occasioned by such third or other notice. After bail has been perfected the defendant becomes in court, and may on the third day demand the copy declaration, or bill original, and proceed in the ordinary course; but the plaintiff may at any time before this demand is given withdraw his action, and, if he enter a *Cassetur billa*, no costs are allowed to the defendant. If the plaintiff withdraw his action, or if it become settled in any manner, upon application to the court, an *Exoneretur* will be entered to the recognizance: this may also be obtained upon the removal of the action, provided bail has been perfected above.

If bail has been put in, and upon the trial of the action, or in any other method, the plaintiff obtain judgment against

the defendant, the plaintiff may issue a writ of execution in the ordinary form of writs of execution [i], upon which the defendant may be arrested if the amount exceed 20*l.*, or the plaintiff may direct the serjeant-at-mace immediately to return it *non est inventus*, which return the serjeant will make, as of course.

The bail, at any time before the return is so made by the serjeant-at-mace, may render the defendant to prison, or if the defendant be in custody under any process from the Mayor's Court, the bail may give notice thereof to the serjeant-at-mace, and enter a detainer in the action, in discharge of their recognizance.

If the defendant does not render before the return of *non est inventus* is made by the serjeant, the bail are fixed [k], that is, they become liable under their recognizance, for no render at any time after the return will exonerate them, and the plaintiff may proceed against them by writ of *Scire facias* [l] in the Mayor's Court, or by an action upon the recognizance, either in the Mayor's Court [m] or elsewhere.

The garnishee may put in bail for the defendant in dissolution of the attachment [n], but unless the garnishee has the authority of the defendant for so doing, and is fully cognizant of the transactions between the plaintiff and defendant, he

---

[i] Form No. 29.

[k] It appears formerly to have been the practice to issue an execution, directing the serjeant-at-mace to take the principal, and in default thereof to take the bail. In *Masters* v. *Lewis*, 5 Modern, 95, Lord Holt said "there "are several customs in London against law, arresting the bail without a *Scire facias* or *Capias* against the principal;" but in a much earlier case, *Devered* v. *Ratcliffe*, Cro. Eliz. 185, it is said that it is not a good custom to issue execution against the bail without a *Scire facias*; the practice, however, for many years past, has been as stated in the text.

[l] Form No. 30.

[m] By § 13 of the Mayor's Court Procedure Act 1857, where the cause of action arises within the jurisdiction of the Mayor's Court, a plaint issuing out of that court may be served in any part of England or Wales.

[n] Bohun, 260, 467; *Lewis* v. *Wallis*, 2 Jones, 222.

may seriously prejudice the defendant, besides involving himself in great loss; for if no debt be due from the defendant to the plaintiff, and the garnishee be unprepared with the necessary proof, the defendant may by this act of the garnishee have a verdict and judgment against him to an amount even beyond the liability of the bail.

If the bail have been obtained by the garnishee without the authority of the defendant, and they have to pay the plaintiff under their recognizance, the garnishee may be liable to them, and even if the garnishee have in his hands money of the defendant to the amount for which the bail are liable, he will not be justified in paying them that amount on account of the defendant. The defendant might also, after bail has been put in, admit the debt, and suffer judgment in the action, whereby the bail would become liable.

2. *By Render.*

The defendant is at liberty to render his body to prison in dissolution of the attachment at any time before satisfaction acknowledged. No notice of his intention to render is necessary to be given to the plaintiff, nor can he in any manner hinder it. The render is a voluntary proceeding on the part of the defendant; he applies to the serjeant-at-mace, who enters a note of the cause at the prison, and the appearance is entered in the court as an appearance and render in dissolution.

The defendant may appear by render, where there are several actions and attachments, in one or more of them in the same manner as beforementioned [o].

The render of the defendant to prison in dissolution of an attachment is a voluntary render, and although after he has rendered he is detained under a mesne process, yet he is not within the 1 and 2 Vict. c. 110; for although that statute abolishes arrest on mesne process, yet it only relates to the

---

[o] See *ante*, p. 105.

arrest of the defendant by the act of the plaintiff in issuing out a writ for that express purpose. The statute has no effect whatever as to the voluntary act of the defendant, either as to putting in bail or rendering himself, in order that he may get rid of the customary attachment against his property [p].

Upon the third day after the render, the defendant may demand of the plaintiff the copy bill, and plead thereto, and proceed to trial as in ordinary issues.

If the plaintiff recover judgment against the defendant in the action, he is bound to issue his execution, and charge the defendant thereon, or the defendant may apply to the court to compel the plaintiff to do so.

3. *By Payment of Money into Court.*

The plaintiff is entitled to security that the defendant should be forthcoming at the end of the suit; at times the obtaining two housekeepers for double the amount sworn to is found difficult; the court therefore will allow the defendant to appear by common bail in dissolution of the attachment upon payment of money into court, but the garnishee cannot do this without the defendant's authority, except upon the same risk as putting in bail for the defendant [q].

When the sum in the garnishee's hands is larger than the debt sworn to by the plaintiff, the defendant must pay the amount sworn to by the plaintiff into court; but where it is less than the amount sworn to, then upon proof of the amount in the garnishee's hands by affidavit [r], the court will allow common bail in dissolution upon such amount being brought into court.

If the defendant resides out of England the court usually orders a sum of money beyond the amount mentioned, to be paid into court to cover the plaintiff's costs, having regard to

---

[p] *Day* v. *Paupiere*, 18 Law Jor. Rep. Q.B. 270; S.C. 14 Jurist, 40; S.C. 7 D. and L. 12.

[q] *Ante*, p. 110, 111.

[r] Form No. 31.

the amount sought to be recovered; but if the defendant resides in England, as the plaintiff may remove his judgment, the court will not compel the defendant to pay into court any amount on this account.

Under circumstances the court will vary the terms of the order, but the permission to appear in this method being in the discretion of the court, it will in all cases compel the defendant to admit the jurisdiction of the court.

The amount paid into court stands to the credit of the cause, and to such order as the court may make therein. If the defendant admits part of the claim of the plaintiff, he may obtain an order that part of the money so paid in be taken as paid in with his plea, in which case the plaintiff will be entitled to receive it out of court.

II. UPON WRIT OF *SCIRE FACIAS AD DISPROBANDUM DEBITUM.*

Although the defendant cannot dissolve the attachment after the plaintiff has signed satisfaction, yet he may still appear in the action and dispute the plaintiff's claim; and if he perfect his appearance within a year and a day after the execution [s], and afterwards, though after the expiration of that period, obtain a judgment of restitution, the pledges to restore are liable to him for the amount of the judgment, exclusive of costs. To enable a defendant to appear in the action, he must issue a writ of *Scire facias ad disprobandum debi-*

---

[s] The year and day *disrationare debitum* runs from the execution and not the judgment; see *Leuknor* v. *Huntley*, Cro. Eliz. 713; Com. Dig. Att. F. The execution bears no other date than the *teste*, which is upon the day final judgment is signed; no date appears upon the record subsequent to that of the final judgment, the finding of the pledges, the execution and satisfaction all appearing under that date. The recognizance of the pledges is often taken and execution issued at a much later period. Ashley, 81, says the writ may be brought within a year and a day after satisfaction.

tum [t], and obtain allowance thereof by the Registrar. A summons [u] must then be issued, made returnable the third day at least after issuing; this summons is served by the serjeant-at-mace. Notice of bail in precisely the same form, and subject to the same rules as the notice of bail in dissolution, must be served upon the plaintiff, but the day named for the bail to attend and justify must be the same as the return day of the summons on the writ of *Scire facias*. If the bail justify on the day named, the appearance of the defendant by bail is entered upon the writ [x], and the plaintiff must then also enter his appearance [y] thereon, or the defendant will be entitled to judgment for want of appearance.

Bail on a writ of *Scire facias ad disprobandum debitum* enter into the same recognizances and are liable to the plaintiff under their recognizances in precisely the same manner as bail in dissolution of an attachment, but the plaintiff in proceeding against them must of course give credit for any sum that he has received under the attachment against the amount which he may obtain judgment for in the action.

Strictly, under the custom, the defendant is bound to put in bail in double the amount of the plaintiff's debt, irrespective of the sum the plaintiff may have recovered under the attachment; but, where the plaintiff has received under the attachment the whole amount of his debt, the court will generally, on application, allow the defendant to appear by common bail instead of special bail, and where he has received only part of his debt the court will permit bail to be given in a reduced amount, having regard to the amount claimed to be due to the plaintiff by his affidavit, after giving credit for the sum received under the attachment, the application being however to the equity of the court, the defendant must in all such cases admit the jurisdiction of the court.

---

[t] Form No. 32.
[u] Form No. 33.
[x] Form No. 34.
[y] Form No. 35.

If the defendant reside abroad, some additional amount of bail is sometimes ordered to be taken in the above cases as a security for costs, but in no case exceeding in the whole double the amount of the plaintiff's debt as sworn to.

If the defendant is unable to ascertain the residence of the plaintiff, the court will upon application direct that service of the summons and notice of bail upon the plaintiff's attorney be deemed good service upon the plaintiff.

If upon such service the plaintiff does not appear, the defendant upon perfecting his bail is entitled to sign judgment [z].

If the plaintiff appear, the defendant may declare in *Scire facias* and proceed thereon, but if the only issue really to be tried is the plaintiff's debt, the plaintiff with his appearance prays *Stet billa* [a], which is entered upon the record, admitting thereby the defendant's right to compel the plaintiff to prove his demand in the action; after the plaintiff has prayed *Stet billa*, the defendant may demand the copy bill, and proceed thereon as in ordinary issues in the court.

The issue upon the trial is the liability of the defendant to the plaintiff; no notice whatever is taken of any of the proceedings in the attachment. If the plaintiff recover against the defendant, the verdict is taken for the full amount irrespective of the sum received under the attachment; but judgment is had only for that amount, after deducting the sum received in the attachment, together with costs [b]. For this amount the bail are liable to the extent of their recognizance, unless they render the defendant in the same manner as a render by bail in dissolution.

If the plaintiff recover less than the amount received under the attachment, still the plaintiff enters his verdict as before; and if the debt and costs are less than the amount received under the attachment, then judgment of restitution [c] is given

---

[z] Form No. 36.
[a] Form No. 37.
[b] Form No. 38.
[c] Form No. 39.

for the balance, and for this sum the pledges to restore are liable to the defendant.

If the plaintiff fail in the action the verdict is entered for the defendant, with judgment of restitution[d] for the whole amount received under the attachment, but the pledges to restore are liable only for this amount, exclusive of any costs, the recognizance being to *restore* the amount received by the plaintiff. A writ of execution must be issued against the plaintiff and returned *nihil* in the same manner as against a defendant[e], and the pledges sued upon their recognizances[f].

---

[d] Form No. 40. [e] See *ante*, p. 110.

[f] See *ante*, p. 94, for remedy when pledges insufficient.

CHAPTER VII.

NEW TRIAL, ERROR, APPEAL.

THE court will grant a new trial upon the ordinary grounds of default or misconduct of any of the parties, jury, counsel, attorneys, &c., or of surprise or fraud, but generally an application for a new trial on account of the mistake of the judge must be made under the provisions of the Mayor's Court Procedure Act[a].

Should either party be desirous of obtaining a new trial, unless leave is reserved to move, he must, before the opposite party has obtained judgment, apply to the judge if sitting, or if the judge is not sitting then he must apply in the manner in which ordinary applications are made to the court, for stay of judgment and leave to move; it must be supported by an affidavit of the *bona fides* of the application, and affidavits should also be filed, setting out the grounds relied upon to support the motion for such new trial.

Prior to the passing of the Mayor's Court of London Procedure Act 1857, there was no appeal from the decision of the Judge of the Mayor's Court, the only method of reviewing the proceedings was by writ of error out of Chancery to the Court of St. Martin's le Grand, which was a court of delegates, and from thence to the House of Lords; but by the 4th section of that Act, it is enacted that no petition shall be presented to or received by the Lord High Chancellor for any writ of error to review any proceeding in the Mayor's Court, nor shall any writ of error be issued thereout to review any such proceeding, nor shall any writ or other pro-

---

[a] See *post*, p. 118, 119.

ceeding be issued to the Court of St. Martin's le Grand for any purpose as a court of error, to review any proceeding of the Mayor's Court, but in all cases of error arising on proceedings in the Mayor's Court, the Exchequer Chamber shall be the court of error for the purposes of the Act, and all matters in error shall be proceeded with according to the rules to be framed for that purpose.

An appeal is given from the judgments of the court by the 8th and 10th sections of the same Act, which would appear to include attachments in some instances.

By the 8th section, "If either party appearing on the trial "of any cause in which the sum sought to be recovered shall "exceed Twenty pounds shall be dissatisfied with the deter- "mination or direction of the court in point of law, or upon "the admission or rejection of any evidence, such party may "appeal from the same to any one of the superior courts (two "or more of the *puisne* judges or barons thereof shall sit out "of term as a court of appeal for that purpose), provided that "such party shall, within two days after such determination "or direction, give notice of appeal to the other party or his "attorney, and also give security within such time or times as "the court shall direct, to be approved of by the Registrar of "the court (if the judge shall so direct), for the costs of the "appeal, whatever be the event of the appeal, and for the "amount of the judgment if he be the defendant, and the "appeal be dismissed; provided nevertheless, that such se- "curity, so far as regards the amount of the judgment, shall "not be required in any case where the judge of the court "shall have ordered the party appealing to pay the amount of "such judgment into the hands of the Registrar, and the "same shall have been paid accordingly; and the said court "of appeal may either order a new trial on such terms as it "shall think fit, or may order judgment to be entered for "either party, as the case may be, and may make such order "with respect to the costs of the said appeal as such court "may think proper, and such orders shall be final."

By the 9th section, "Such appeal shall be in the form of "a case agreed on by both parties or their attorneys; and if "they cannot agree, the judge of the court, upon being ap- "plied to by them or their attorneys, shall settle the case "and sign it, and such case shall be transmitted by the Regis- "trar to the Rule department of the Master's Office, of the "court in which the appeal is to be brought."

By section 10, "If upon the trial of any issue the judge "shall grant leave to the plaintiff or defendant to move in "any of the superior courts to set aside a verdict or a non- "suit, and to enter a verdict for the plaintiff or defendant, or "to enter a nonsuit, as the case may be, or for a new trial, "the party to whom such leave may have been given may "apply by motion to such superior court, within such period "of time after the trial as motions of the like kind shall from "time to time be permitted to be made in such superior "court, for a rule to show cause why such verdict or nonsuit "should not be set aside and a verdict entered for the plain- "tiff or defendant, or a nonsuit entered, or why a new trial "should not be had, as the case may be, in such action; which "court is hereby authorized and empowered to grant or re- "fuse such rule (which rule, when granted, shall operate as "a stay of proceedings until the determination thereof), and "afterwards to proceed to hear and determine the merits "thereof, and to make such orders thereupon and as to costs "as the same court shall think proper; and in case such "court shall order a new trial to be had in any such action, "the party obtaining such order shall deliver the same, or "any office copy thereof, to the Registrar of the said court, "and thereupon all the proceedings on the former verdict or "nonsuit shall cease, and the action shall proceed to trial, "according to the practice of the court, in like manner as if "no trial had been had therein; or in case the court before "whom such rule shall be heard shall order the same to be "discharged, the party obtaining any such order may, upon

"delivering the same or an office copy thereof to the Regis-
"trar, be at liberty to proceed in any such action as if no
"such rule *Nisi* had been obtained; and if a verdict be or-
"dered to be entered for the plaintiff or defendant, or a non-
"suit be ordered to be entered, as the case may be, judgment
"shall be entered accordingly."

CHAPTER VIII.

JUDGMENT BY DEFAULT.

I. For Plaintiff.
   1. *For Money.*
   2. *For Goods.*

II. For Garnishee, for want of Prosecution.

A JUDGMENT by default against a garnishee is as good a discharge against a defendant as a judgment on verdict; if therefore the garnishee has no defence to the attachment, he is not bound to appear or plead [a].

If the plaintiff has not before two o'clock on the return day of the *Scire facias* received a sealed notice of the appearance of the garnishee, or if the garnishee has not pleaded at the expiration of the demand of plea, the plaintiff may sign judgment by default for want of appearance [b]; or for want of plea. If a judgment by default have been obtained through the inadvertence of the garnishee, the court will, upon application, set aside the judgment, and allow the garnishee to appear and defend the attachment. The application must be supported by an affidavit, but the court does not look very strictly at the merits, as the garnishee, in default of raising the defence to the attachment, might run the hazard of having to pay the money a second time. The application will however be on payment of costs; and it should be made immediately, as the mere notice of application is no stay of proceedings, further than the payment of the money under the satisfaction.

---

[a] See *ante*, p. 98. Appearance of Garnishee, cap. v.

[b] Bohun, 260; see Com. Dig. Att. A.

I. FOR PLAINTIFF.

1. *For Money.*

If the plaintiff proceed for money only, he is entitled to final judgment. If the garnishee has not appeared, the default is entered after the words "solemnly called," as "and "doth not appear, but makes default. Therefore it is con- "sidered," *&c.*, or if the garnishee has appeared, and has not pleaded, the default is entered immediately after the appearance, as "because the said garnishee hath not pleaded to, "or shown any cause why the said plaintiff should not have "execution of the said moneys numbered, *&c.*, so attached as "aforesaid, Therefore it is considered," *&c.*, the judgment and subsequent proceedings being precisely the same as in a verdict [c]. If the plaintiff proceeds for money and goods he may sign final judgment for the money, but can only have judgment of appraisement for the goods [d].

2. *For Goods.*

If the plaintiff proceed for goods, the default of the garnishee is entered on the record in the same place and language as in judgment for money, but the plaintiff must sign judgment of appraisement of the goods, as the value must be ascertained before they are delivered to the plaintiff; after the judgment of appraisement all the proceedings are the same as on a judgment of appraisement on verdict [e].

II. FOR GARNISHEE, FOR WANT OF PROSECUTION.

If the garnishee be desirous of getting rid of the attachment he should appear and rule the plaintiff to prosecute his attachment, but he cannot obtain this until after the plaintiff

---

[c] See *ante*, p. 90 *et seq.* [d] See *ante*, p. 91. [e] See *ante*, p. 91.

has made default by omitting to deliver the copy record on the day on which he was entitled to do so; thus, if an attachment be made on the first day of a month, and the garnishee appear before the seventh, the plaintiff could deliver his copy record on the seventh day (allowance being made for the Sunday intervening, which does not count), in failure of which the garnishee may, after two o'clock on that day, rule the plaintiff to prosecute. The rule is obtained by application in the office of the court, by filing a *Præcipe* containing the names of the parties and the date of the attachment [f]. The garnishee thereupon serves a copy of the rule upon the plaintiff's attorney. If the plaintiff deliver his copy record, the garnishee can plead and proceed to trial; if the plaintiff do not deliver his copy record within four days after the day of service of the rule, the garnishee, upon an affidavit of service [g], may prepare a record [h], and thereupon sign judgment of *non pros.* in the office, and obtain a certificate thereof.

Although the service of the rule need not be personal service on the plaintiff's attorney, yet it ought to be left with some clerk or authorized person in his office, and if not so served, special reason must be assigned in the affidavit for the departure from the method pointed out.

---

[f] Form No. 41. [g] Form No. 42. [h] Form No. 43.

CHAPTER IX.

OF THE ELONGAVIT.

WHERE an attachment is made of goods belonging to a defendant, we have seen that the plaintiff must sign judgment of appraisement and have the goods valued before he can obtain them under his attachment; but it may happen that the garnishee has parted with the property, either because the goods were perishable, requiring immediate sale, or from care of the defendant's interest, as goods made for a particular season, or goods in general, where the consignee finds a profitable market, whereas by keeping them they might deteriorate in value[a] or the market for them be lost; or it may happen that the goods are out of the city, or that the garnishee may refuse to allow them to be appraised, in any of which cases, as no appraisement can be made of the goods, the serjeant-at-mace returns upon the precept of appraisement that the garnishee has eloigned or removed the goods out of the jurisdiction; this is called a return of *Elongavit*[b], an entry of which is made upon the record[c], and concludes with a judgment of the court that an inquiry be made of the value of the property so eloigned, &c.[d]; this inquiry is set down for trial, and the assessment is made by a jury[e] after the manner of ordinary issues, the plaintiff in the attachment appearing as plaintiff in the *Elongavit*.

The plaintiff on an *Elongavit* proves the value of the goods only, for it is unnecessary to prove that the goods are the pro-

---

[a] See pp. 29, 30.
[b] Bohun, 257; Ashley, 100; Com. Dig. Att. C.
[c] See Form No. 44.
[d] See *ante*, p. 10.
[e] Com. Dig. Att. C.; Ashley, 100; Bohun, 257.

perty of the defendant, as that is admitted by the judgment, either in judgment by default or on verdict [f].

It is said that the jury must assess the value of the goods according to what they were worth at the time of the attachment made, and not according to the price they would fetch on the day of the verdict [g]; but it is suggested this cannot be a safe rule, and that the inquiry made by the jury, and the assessment of the value, must depend in some measure on the transactions between the parties and their usual course of trading, otherwise it might create a manifest injustice either upon the garnishee or defendant. If the garnishee, at the time he sells the goods, obtains a greater price for them than he could have obtained at the time of the attachment being made, inasmuch as the defendant would be entitled, under ordinary circumstances, to recover against the garnishee the larger sum, and as the plaintiff stands as against the garnishee in the position of the defendant, and is entitled to all benefit which the defendant could claim against him, there does not appear any cause why the plaintiff should not recover the larger sum under the *Elongavit*, nor does there appear any reason why the garnishee should reap the benefit of the difference of the price, as, if the defendant after the attachment sued him for the goods, he would plead the attachment in discharge, whereby the defendant would obtain credit only for the smaller sum.

If the goods produced a smaller amount at the time of the sale than they would have produced at the time of the attachment, the sale being a *bonâ fide* sale, and the defendant's interests not sacrificed, it is difficult to understand why the garnishee should be a loser by such sale, and have to pay the difference in price between the day of the attachment and the day of sale, a sum which he had never received on account of the defendant, and which the defendant never could recover

---

[f] Bohun, 257; Ashley, 101.

[g] Locke, 69.

against him, especially if the goods were perishable goods, which might have fallen in value between the day of the attachment and the first day upon which he could effect a sale, and where a further delay in the sale might entail a total loss in value.

If the garnishee do not sell *bonâ fide*, then it would appear to be a question what would have been the value at the time the appraisement would have been made. If however the garnishee removes them, or refuses to allow them to be appraised, inasmuch as the property is not sold, the defendant should be entitled to claim the value of the property at the time that the appraisement would have been made, or the value at the time of the attachment if larger, it being the garnishee's fault for removing them; indeed, a garnishee might purposely remove the goods, if the rule spoken of were to be held good, because he might know that the value was much greater at the time the appraisement would have been made than at the time of the attachment, and having only to pay the value at the time of the attachment he would benefit by the difference, as he could plead the attachment in any action brought against him by the defendant, and he would be liable to the defendant for the value only at which the property was appraised by *Elongavit*.

The finding of the jury and judgment is entered on the record [h], and the execution is against the garnishee for the value found by the jury [i], and the record is made up as in ordinary cases as to pledges and satisfaction [k].

Where the garnishee has sold the property on credit, he is liable on the *Elongavit*, notwithstanding the credit may not have expired.

---

[h] Form No. 45.

[i] Com. Dig. Att. C. Form 20.

[k] The satisfaction recites that the plaintiff had execution of the said £ —, "being the value assessed by the jury of the goods and chattels so "attached as aforesaid."

It is not always necessary, where the garnishee has sold the property after the attachment, that the plaintiff be put to the expense of an *Elongavit*, as if the plaintiff has proceeded for money and goods, and the garnishee has sold the goods before the plaintiff is entitled to judgment by default for want of appearance or want of plea, the plaintiff may, upon ascertaining the amount of the sale of the goods, sign judgment for the amount under the allegation that the garnishee has money in his hands belonging to the defendant; for as all money and property received by the garnishee and in his hands at and from the time of the attachment, until the plea, is applicable to the attachment, the money the produce of the property becomes liable, and the plaintiff may take it under his judgment; or if the plaintiff has proceeded for goods only, the record may be amended by adding an allegation that the garnishee holds money, *&c.*, of the defendant, and the garnishee may thereupon be resummoned. If the plaintiff has proceeded against the garnishee for goods only, and the garnishee, having goods only in his possession, sells the property after plea, inasmuch as the jury upon the trial of the attachment can only find that between the date of the attachment and plea pleaded the garnishee had goods of the defendant's in his possession, which goods cannot be appraised under the judgment in the attachment, an *Elongavit* appears the only remedy, unless the plaintiff can obtain before or at the trial of the attachment an order to amend the record by inserting money instead of goods, and obtaining a plea of the garnishee to the amended record.

No costs are allowed upon an *Elongavit*, though the garnishee may have acted wrongly in having sold the goods, or in refusing to allow them to be appraised.

CHAPTER X.

OF THE BILL OF PROOF.

We have seen that as a rule no attachment can successfully be made of any property of which the defendant has not the sole and absolute right in him, and that the garnishee may raise the want of title in the defendant as a defence to the attachment; this, however, is only applicable when the defence so raised would also form a defence to any action brought against the garnishee by the defendant to recover the same property; for although the defendant may not be entitled absolutely to the property in his own right, yet he may have as against the garnishee a title to the property, which the garnishee is estopped from disputing, and in such cases, as by the attachment, the plaintiff places himself against the garnishee in the position of the defendant, the garnishee cannot, under the attachment, raise any defence which he could not raise in any action which the defendant brought against him to recover the same property.

If the master of a vessel enter into a charter-party with the garnishee without disclosing the name of the owner, and an attachment is made in the garnishee's hands of the freight due thereon as against the master, proof of the ownership of the vessel being in some other person than the master will form no defence to the attachment; so if an agent of an undisclosed principal sells goods in his own name to the garnishee; so also in the case of joint ownership, as if a defendant, a joint owner of a vessel, enter into a charter-party with the garnishee, wherein the defendant appears as sole owner, and an attachment is made in the garnishee's hands of the amount due thereon as against the defendant solely, proof of the joint

ownership only being in the defendant will form no answer to the attachment. Although a garnishee is not permitted thus to raise a *justertii* as a defence to the attachment, yet the custom permits the owners to appear and claim the property; this is done by what is termed a Bill of Proof[a]. It is in the nature of a petition to the court, by the person claiming either the entire property or part of the property, or an interest therein, and praying to be admitted to prove such claim in bar of the attachment, so far as the claim extends.

Sometimes an attachment may be made in the hands of a garnishee to which he may have a good defence, but from various causes it may be inexpedient for him to force on the plaintiff to trial, or the garnishee may be in collusion with the plaintiff, and may refuse to compel the plaintiff to proceed in the attachment; in either of these cases the party claiming the property may be compelled to resort to a substantive proceeding to establish his right, and a bill of proof will enable him thus to proceed.

The bill of proof does not appear of late years to have been so much in use as formerly, probably on account of the latitude now given to the reception of matters of defence under the plea of *nil habet*, but, failing the defence in the attachment, the bill of proof appears to be the proper remedy, not only to establish an absolute right in the property attached, or a part thereof, but also an interest therein, as an equitable mortgage or lien, or the joint ownership with the defendant in the property, although property in which the defendant is only jointly interested is not now considered liable to an attachment for a separate debt of the defendant. It appears that formerly such joint property was attachable for a separate debt[b], the party jointly interested claiming his interest under

---

[a] Form No. 46.

[b] Where N. is indebted to A. and B. by obligation in 20*l.*, and A. is indebted to M. in 10*l.*, and M. brings plaint of debt for 10*l.* in London against A., which is returned *nihil*, and the debt of 10*l.*, parcel of the 20*l.*,

a bill of proof. Assignees under a bankruptcy or insolvency of the defendant may claim the property by the bill of proof.

A bill of proof on being entered, and a notice thereof served, becomes a stay of proceedings in the attachment, and is constantly used for the purposes of delay; it may be entered and the notice served at any time before the second day preceding the day of trial of the attachment without any affidavit of merits, and the plaintiff cannot object to it, however much it may appear even on the face of it to have been filed for delay, as if the claimant is described as John Doe of London, or by any other as general description, and the court will not compel any better description, or compel the attorney filing it to say whether it be filed for delay or not; and where the approver was described as residing in a particular house, and the plaintiff swore no such person resided there, the court would not interfere.

A bill of proof may however be entered and notice served at any time before the jury are sworn to try the attachment, provided it is accompanied by an affidavit of merits. If tendered within the two days before the sitting of the court for the trial of the attachment, the affidavit must satisfy the Registrar that the approver has merits, whereupon it becomes a stay of proceedings, but if he is not satisfied with the affidavit, and refuse to allow the bill to be entered, an application may be made to the court for permission to do so.

The affidavit of merits must state positively that it is not entered for the purposes of delay, and whether made by the approver himself or any person on his behalf, it should state generally the title of the claimant.

The bill is engrossed upon parchment and entered in the office of the court by a *Præcipe* being filed containing the name

---

is attached by the custom in the hands of the said N., and recovered and execution had; this is a good bar at the common law against A. and B., for the bar to the one is a bar against both. Bro. Ab. tit. London, 9; 22 Hen. VI., 47.

of the claimant, who is termed the approver, together with the particulars of the attachment [c] in which the property claimed by the approver is attached; the bill of proof is thereupon sealed, and a notice must be served upon the plaintiff's attorney, until which time it is no stay of proceedings in the attachment.

One bill of proof is sufficient, although there may be several attachments on the same property, and by different parties, in which case it must set out all the attachments in which the proof is claimed, but it may mention some and omit others.

After the approver has entered and served notice of his bill of proof, the plaintiff must appear thereto within two days, and give notice thereof to the approver, or in default thereof the approver may sign judgment for want of the appearance; immediately the plaintiff has appeared, he may enter a rule for probation; this is a four-day rule. If the plaintiff do not enter this rule the garnishee may, by leave of the court, do the same, and place himself in the position of the plaintiff; and if the probation is not delivered to the plaintiff, the plaintiff or garnishee may sign judgment for want of probation. Before however the plaintiff or garnishee is entitled to do this, he must make an affidavit [d] of the service of the rule for probation, and also that no probation has been delivered. Where however the bill of proof is filed for delay by the plaintiff or by some person in collusion with him, and the garnishee is unable to ascertain whether there is a probation delivered, or where the probation has been delivered, and the proceedings of the approver are manifestly for delay to the detriment of the garnishee, the garnishee may apply to the court by notice to the approver and plaintiff, and upon cause being shown, the court will compel the approver to proceed or dismiss the bill of proof or probation. Where the attachment stands in the paper for trial as a *remanet*, or if the plaintiff has set it down

---

[c] Form No. 47. [d] Form No. 48.

for trial for a particular day, which he is at liberty to do notwithstanding the bill of proof may not then be disposed of, it may be tried on that day, provided the bill of proof is disposed of in the interim, and judgment is had thereupon before the trial of the attachment, even if judgment is had in the bill of proof on the same day as the trial of the attachment. But the attachment cannot be tried the same day as the bill of proof; for although the bill of proof be virtually disposed of as against the approver, yet as judgment upon it cannot be signed until the day after the trial, it is not finally got rid of. In the same way, where judgment has been given on a demurrer to a probation, the plaintiff in attachment is entitled to try the same day as judgment[e].

The probation is in the nature of a declaration setting out the title of the approver to the property attached[f], but it is considered as an equitable proceeding, and is not construed so rigidly as an ordinary declaration. It is however subject to demurrer if the title of the approver is not set out clearly, or if it does not show a title upon the face of it[g].

The approver may immediately on delivering his probation demand a plea in the ordinary form; the plaintiff must thereupon plead, and the record is made up and the issue tried as ordinary issues.

The approver is in the position of plaintiff upon the trial, and he is bound to substantiate his claim under the probation; the garnishee need not appear, as no question under the attachment comes in issue.

If the verdict be in favour of the approver, for the whole property[h] attached, the judgment[i] of the court is that the

---

[e] *Quære*: Whether the trial upon a bill of proof is an issue within the meaning of the 8th and 10th sections of the Mayor's Court Procedure Act, 1857.

[f] Form No. 49.

[g] The approver may incorporate the probation with the formal part of the bill of proof, and file it as a probation in the first instance.

[h] Form No. 50.

[i] Form No. 51.

plaintiff be without a day to proceed with his attachment, thereby rendering it void. If the verdict be for a portion[k] only of the property attached, the judgment[l] is that the plaintiff be without a day as to that portion, and the remainder continues liable to the attachment.

Although the issue upon the bill of proof is whether the property attached is the property of the approver or not, yet the judgment of the court is given in relation to the attachment only. It does not in any other manner affect the possession of the property by the garnishee, either on behalf of the approver, defendant, or any other person, even if the approver show most positively that the property belongs to him, as the court might, by ordering a delivery of the goods to the approver, or making other similar order, prejudice the interests of other parties not parties to the issue.

The bill of proof being a customary proceeding, it cannot be removed from out the Mayor's Court[m], neither are any costs allowed to either party on a bill of proof or probation, or on a demurrer to a bill of proof, notwithstanding 8 and 9 Will. III., c. 11, § 2.

---

[k] Form No. 52. [l] Form No. 53.

[m] See *Bruce* v. *Wait*, 3 M. and W. 21.

CHAPTER XI.

OF THE REMOVAL OF THE ACTION AND ATTACHMENT FROM THE MAYOR'S COURT INTO THE COURTS AT WESTMINSTER.

ALTHOUGH the Mayor's Court has jurisdiction over the issues arising upon attachments in exclusion of the courts at Westminster, yet, inasmuch as an attachment is merely for the purpose of compelling the defendant to appear to an action against him, over the subject matter of which action the courts at Westminster have jurisdiction, they will allow a *Certiorari* to be issued to remove the action, with all the proceedings thereon, and upon the return being made to the *Certiorari* they will give the defendant the same liberty of appearing to the action which he had in the Mayor's Court, namely, either by special bail [a], by render [a], or by payment of money into court in lieu thereof [b].

The action and attachment can only be removed by writ of *Certiorari* [c], and if the writ is not issued before the attachment is set down for trial it can only be removed by the express order of one of the judges of the superior courts at Westminster allowing and directing a *Certiorari* to issue, and then only

---

[a] *Day* v. *Paupiere*, 13 Q. B. 802; S. C. 7 D. and L. 12; S. C. 18 Law Jor. Rep. Q. B. 270; *Tassie* v. *Kennedy*, 5 D. and L. 587; S. C. 17 Law Jor. Rep. Q. B. 215; *Blanchard* v. *De la Crouée*, 16 Law Jor. Rep. Q. B. 181; S. C. 9 Q. B. Rep. 869; *Keat* v. *Goldstein*, 7 B. and C. 525; S. C. 1 Man. and Ryl. 305; *Jameson* v. *Schonswar*, 1 Dowl. 175; *Loveridge* v. *Whitrow*, 12 Mod. 213, case 348; *Lewis* v. *Wallis*, T. Jones, 222; Locke, 51.

[b] *Tassie* v. *Kennedy*, 17 Law Jor. Rep. Q. B. 215; S. C. 5 D. and L. 587; *Bastow* v. *Gant*, 21 Law Jor. Rep. Q. B. 377; S. C. 13 Q. B. 807; S. C. 17 Jurist, 299.

[c] Mayor's Court Procedure Act, 1857, § 52.

upon such terms as to costs, bail, or payment of money into court as such judge on summons shall think fit; but a summons only, without any order of the judge thereon, will not stay the trial in the Mayor's Court [d].

The garnishee or defendant may issue the *Certiorari* [e]; it is directed to the mayor and aldermen as the judges of the Mayor's Court. When issued it is lodged with the Registrar of the Mayor's Court, who endorses thereupon the allowance, from which time it acts as a suspension of all the proceedings in that court; and he gives notice to the plaintiff of such writ having been issued and allowed.

A return is made to this writ by the Registrar, in the name of the mayor and aldermen [f]. The return recites the action and the attachment, and all the proceedings taken thereupon. This return, although made by the Registrar, the plaintiff in the action is bound by; he should therefore examine it to see that it is correct, for if the action alone is returned without the attachment, or if the attachment is set out without showing the amount sworn to, unless the court above will allow the return to be amended, the court into which it is removed will not compel the defendant to put in special bail, neither will it grant a *Procedendo*, as it is only by reason of the attachment that special bail is required [g].

If an attachment has been dissolved by bail in the Mayor's Court, the return must set out all the proceedings in the attachment, the dissolution of the attachment, and the proceedings after the dissolution; and the defendant must still give bail above, in the same manner; but the same bail taken below

---

[d] Mayor's Court Procedure Act, 1857, § 18.

[e] Form No. 54.

[f] The return need not now be filed, but if it is filed the court will grant a *Procedendo*. *Watson* v. *Clerke*, Carthew, 75; *Fazakerly* v. *Baldoe*, 6 Mod. 177.

[g] See authorities in note [a], p. 134, *ante*, and *Asgill* v. *Hunt*, 10 Mod. 440; *Hunt and Hargill*, Fortescue, 347.

may be taken above, as a matter of course, unless they have become insolvent since entering into their recognizances.

If the defendant have rendered himself to prison, in dissolution of the attachment, the removal of the proceedings is still by *Certiorari* [h]. The return is made in the same manner, and the defendant must render himself to the custody of the court above.

If an attachment has been dissolved by payment of money into court, the return must still set out the proceedings, and the defendant obtains from a judge of the court into which it is removed an order that the Registrar of the Mayor's Court be at liberty to pay the amount standing to the credit of the cause in the Mayor's Court into the court above: this order must be filed in the Mayor's Court, and an order of that court obtained that the amount be so transferred, or the money may remain in the Mayor's Court by consent until after the determination of the suit, and an application then made for the payment to the party entitled thereto.

It is sufficient if the return show that the proceedings are under the custom of foreign attachment, without setting out the custom as fully as upon a plea [i], and the courts above will so far take notice of the custom upon the return, that they will not allow a defendant to appear without bail or render, or payment of money into court; even if the defendant be an executor or administrator, still he must put in special bail [k]; or a peer of the realm [l], or a public company [m].

Upon the return of the writ [n] the plaintiff may obtain a rule in the court out of which the *Certiorari* issues, from the judge's

---

[h] See Mayor's Court Procedure Act, 1857, §§ 17, 19, 52. See *Day* v. *Paupiere*, note [a], p. 134, *ante*.

[i] *Day* v. *Paupiere*, *ib*.

[k] *Bastow* v. *Gant*, 21 Law Jor. Rep. Q. B. 377; S. C. 13 Q. B. 807; S. C. 17 Jurist, 299.

[l] *Harris* v. *Lord Mountjoy's* case, 2 Leon., 173.

[m] *Ib*.

[n] The writ must be made returnable immediately; Mayor's Court Procedure Act, 1857, § 52.

clerk, for the defendant to appear within four days from the return thereof [o]; and if the defendant do not appear as before mentioned, the plaintiff is entitled to issue a *Procedendo* [p]; so also is he entitled to issue a *Procedendo* if, where there are several defendants, an appearance is not entered for all of them [q].

Immediately the defendant has perfected his appearance above, the cause is effectually removed [r], and the attachment is dissolved, and the garnishee becomes in relation to the defendant as if no attachment had issued, and is liable to the defendant for the property; but neither the Mayor's Court or the court into which the cause is removed have any summary jurisdiction over the garnishee, to compel him to deliver it up.

In attachments upon actions for 50*l.* and under, it would appear that the action cannot be removed, except by order of a judge of one of the superior courts, without putting in sureties for the payment of debt and costs [s].

If the cause has been once removed from the Mayor's Court and has been remanded, it can never afterwards be removed or stayed before judgment [t]. If, however, a second

---

[o] Rules of Practice in superior courts of common law, Hilary Term, 1853, 115, 116, 117.

[p] *Day* v. *Paupiere*; and see authorities, note [a], p. 134, *ante*.

[q] *Keat* v. *Goldstein*, 7 B. and C. 525; S. C. 1 Man. and Ryl. 305; *Jameson* v. *Schonswar*, 1 Dowl. 175.

[r] *Clack* v. *Dixon*, 3 M. and S. 94; see *Keat* v. *Goldstein*, 7 B. and C. 525; S. C. 1 Man. and Ryl. 305; *Jameson* v. *Schonswar*, 1 Dowl. 175; *Lewis* v. *Wallis*, T. Jones, 222. After the removal is perfected, as there are no continuances from the Mayor's Court to the court above, the plaintiff must commence with his declaration; this need not be in the same form of action as that in the Mayor's Court. *Bowerbank* v. *Walker*, 2 Chitty, 517; *Gunn* v. *Mackhenry*, 1 Wils. 277. The plaintiff is not bound to follow the defendant to the upper courts, *Clack* v. *Dixon*, 3 M. and S. 94.

[s] Mayor's Court Procedure Act, 1857, § 16.

[t] 21 Jac. I., cap. 23, § 3.

writ of *Certiorari* issues, a special return must be made to it [u]. No proceedings in an attachment after judgment can be removed by *Certiorari*.

Writ of *Procedendo*.—When the plaintiff is entitled to his writ of *Procedendo*, after issuing he must file it in the Registrar's office of the Mayor's Court, and obtain an indorsement of the allowance, after which he may continue his proceedings in that court as from the last pleading prior to the allowance of the writ of *Certiorari*.

---

[u] *Watson* v. *Clerke*, Carthew, 69.

CHAPTER XII.

OF PLEADING AN ATTACHMENT.

AN attachment cannot be pleaded to an action brought by the defendant in the Mayor's Court against the garnishee, to recover the property attached [a], unless the attachment was made before the action was entered, and then only if judgment has been obtained in the attachment, and execution thereupon executed [b]; it may then be pleaded *pro tanto* [c].

Formerly such judgment and execution might have been given in evidence under the general issue, but now it must be pleaded specially.

If judgment has been obtained, and execution executed in the attachment before the writ in the action is issued against the garnishee, at the suit of the defendant, it may be pleaded in bar [d]. If however the execution is executed after the writ, it must be pleaded to the further maintenance [e]; if the execution is executed after the plea in the action, it may be pleaded *puis darein continuance.*

---

[a] An attachment of goods, however, without any other proceeding, so far places them *in custodiâ legis*, that a refusal by the garnishee on account of the attachment to deliver them up to the owner upon demand will not constitute a conversion to support an action of trover. See *ante*, p. 11.

[b] Jenkins, 138; *Roberthon* v. *Norroy King at Arms*, 1 Dyer, 83; *Brooks* v. *Smith*, 1 Salk. 280. See note [y], p. 95, *ante*.

[c] Bohun, 270; Com. Dig. Att. H.; *Robins* v. *Standard*, 1 Sid. 327.

[d] See *Brooks* v. *Smith*, 1 Salk. 280; *Palmer* v. *Hook*, 1 Ld. Raym. 727; *Briat* v. *Gyll*, Skinner, 639; *McDaniel* v. *Hughes*, 3 East, 367; *Fisher* v. *Lane*, 3 Wils. 297; S. C. 2 W. Bl. 834; *Welles* v. *Needham*, 1 Ld. Raym. 180; *Baker* v. *Hill*, 3 Keb. 627; Com. Dig. Pleader, 2 G 5; *id.* Att. I.; Wms. Saunders, Rep. notes, 67 b.

[e] *Webb* v. *Hurrell*, note [q], p. 81, *ante*.

Great care is requisite in pleading a judgment and execution in an attachment: if it be ill pleaded the garnishee will fail to substantiate his defence, and will have to pay the money a second time [f].

The custom as alleged in the plea, the proceedings of the plaintiff in the attachment as averred in the plea, and the record of the proceedings of the plaintiff in the Mayor's Court, should be in strict accordance with each other [g], or the plea may form no defence: thus, if in pleading the custom it is stated to be that the plaintiff in the Mayor's Court should swear to his debt, the want of that fact being averred in the plea is fatal [h]; or if the custom is stated in the plea to be, that if any person be or hath been indebted to the plaintiff, in the Mayor's Court, within the city, the plaintiff shall have garnishment, it ought to be averred that the defendant below was indebted to the plaintiff within the city [i]; but it is not necessary to state the custom to be, that the plaintiff should swear to his debt, or to aver that he did so, or that the debt arose within the city [k], or that the debt of garnishee arose within the city, or that a *Scire facias* issued against the garnishee [l].

The record of the proceedings in the attachment should be relied upon as evidence of its contents; for, if so pleaded, it may prove the contents [m]; but if the plaintiff (defendant be-

---

[f] And has no remedy either at law or equity; 2 Shower, 374; Viner, Ab. tit. Customs of London, L. 10.

[g] *Nonell* v. *Hullett*, 4 B. and Ald. 646; *Magrath* v. *Hardy*, 4 Bing. N. C. 794; see *post*, pp. 142, 143, notes [p] [q] [r]; *Scarpe* v. *Young*, Lutt. 994. Jenkins, 138; *Hope* v. *Holman*, 1 Bro. and G. 60.

[h] *Hatton* v. *Isemonger*, 1 Strange, 641; notes Wms. Saunders, Rep. 67 [b]; see *Leuknor* v. *Huntley*, Cro. Eliz. 713.

[i] *Morris* v. *Ludlam*, 2 H. Bl. 362.

[k] *Banks* v. *Self*, 5 Taunt. 234; *Anonymous*, 1 Vent. 236; Com. Dig. Att. I.

[l] *Banks* v. *Self*, 5 Taunt. 234.

[m] To show that the defendant (garnishee) has paid a sum of money under an attachment, the record of the judgment with the entry of satisfac-

low) deny by his pleading any material circumstance in the record, and the defendant (garnishee below) take issue upon it, if it does not turn out as stated upon the record, the plaintiff will recover: as where, in an action, a defendant pleaded a recovery by foreign attachment, at the suit of a creditor of the plaintiff's, and that the creditor had execution of the sum recovered according to the custom, and the plaintiff replied that no execution was executed, upon which the defendant joined issue, it was held that the defendant having joined issue upon the question of the execution having issued, the jury were not estopped from finding the fact by the record in the attachment reciting the execution and satisfaction [n]. Where, however, the garnishee has no power to question any averment or statement in the record of the attachment in the Mayor's Court, or no knowledge of such being contrary to the truth, and where the judgment and proceedings appear regular, the garnishee is protected by a payment thereunder, although such averments may not be true; as if the record of the attachment states that the defendant therein is indebted to the plaintiff therein within the jurisdiction of the court, but in truth no debt exists from the defendant below to the plaintiff, or where, if any exists, it arose out of the jurisdiction of the Mayor's Court, because after the garnishee has paid under the attachment, if he had to prove in the suit brought against him by the defendant in the attachment the debt for which the attachment was made, or that it arose within the jurisdiction of the Mayor's Court, and in default thereof compel him to pay the debt a second time, it would often work hardship and injustice to the garnishee, who might be entirely ignorant of the debt sued for,—who had no means of contesting the debt, except by appearing and putting in

---

tion is conclusive. *Huxham* v. *Smith*, 2 Campbell, 19; see *Magrath* v. *Hardy*, 4 Bing. N. C. 795, 796.

[n] *Magrath* v. *Hardy*, 4 Bing. N. C. 795, 796.

bail to the original action,—and who might be wholly unable to prove that no debt existed, or, if there were a debt, that it arose within the jurisdiction of the Mayor's Court, although the fact were so. In the absence of fraud, therefore, the objection to the plea of recovery under an attachment is too late after the garnishee has paid the debt to the plaintiff in the Mayor's Court under a regular judgment of that court; but if fraud exists, as if the garnishee have within his knowledge facts which would constitute a good defence to the attachment on behalf of a third person, then the judgment and execution and payment under it, although regular within themselves, will constitute no answer to an action brought by such third person, or in the name of the defendant as trustee for some third person [o]; as where the garnishee had become indebted under bond to the defendant in the attachment, and the defendant had assigned the debt to another person, and given notice thereof to the garnishee before an attachment was made of the sum due upon the bond by a creditor of the defendant's, and the garnishee did not set up the assignment and notice as a defence to the attachment, it was held that the judgment and execution in the attachment formed no defence to an action brought against the garnishee by the defendant, as trustee for the assignee of the debt, as the garnishee ought to have appeared and defended the attachment [p].

If an attachment be pleaded of the recovery of *debitum in præsenti solvendum in futuro*, the plea must allege a special custom, for it is not sufficient to allege the custom of attachment generally [q]; so also in pleading an attachment in a man's own hands a special custom must be pleaded [r], and where an attachment is made in the hands of the plaintiff himself of a

---

[o] *Westoby* v. *Day*, 22 Law Jor. Rep. (NS.) Q. B. 423; S. C. 2 E. and B. 621.

[p] *Id., ib.*

[q] Roll. Ab. tit. Cust. Lond. G. 3; Vin. Ab. *id. ib.*; Com. Dig. Att. I.

[r] *Nonell* v. *Hullett*, 4 B. and Ald. 646.

debt due from him to an intestate, the custom ought to be alleged that if the plaintiff was indebted to the intestate, and the intestate to the plaintiff, that the plaintiff might, in an action against the administrator, attach the debt due to the intestate in his the plaintiff's own hands [s]. Where an attachment has been made of a debt due upon a bond, the garnishee may plead the recovery, although the principal only was paid under the attachment, and the bond was forfeited [t].

As a rule, where a garnishee has paid, as before mentioned, under a regular judgment of the Mayor's Court, the defendant in the attachment cannot in an action against the garnishee raise any question upon the debt of the plaintiff in the Mayor's Court, but he must appear in that court and dispute it under the *Scire facias ad disprobandum debitum.* It appears, however, where the plaintiff and the garnishee are the same person, as where a plaintiff makes an attachment in his own hands, the defendant in the attachment is not compelled to proceed in the Mayor's Court to disprove the alleged debt, but may raise the issue in an action against the garnishee; as if the garnishee plead the attachment the plaintiff in the action may reply that he was not indebted to the defendant (plaintiff and garnishee in attachment), and in such case he is not bound to make a disrationation of his debt according to the custom, but he may traverse it in the action [u].

An attachment may be pleaded by a garnishee in an action on the case, brought against him by the defendant in the attachment, to recover the property attached, for a defendant

---

[s] *Hodges* v. *Cox*, Cro. Eliz. 843. See *Harwood* v. *Lee*, Dyer, 196 b. The custom of attaching a debt in a man's own hands was, no doubt, a method adopted of striking a balance or set-off between mutual debtors. The common law afforded no remedy in such cases until the statute of 2 Geo. II., c. 22.

[t] *Robins* v. *Standard*, 1 Sid. 327; Com. Dig. Att. H.

[u] *Paramore* v. *Pain*, Cro. Eliz. 598; *Coke* v. *Brainforth*, Cro. Eliz. 830; Com. Dig. Att. F.

cannot defeat the attachment by suing for damages if he might have an action of debt[x].

If the custom is wrongly pleaded, or if it be denied, the plaintiff in the action must traverse the existence of the custom, or may reply specially[y], and upon motion obtain a rule for a suggestion upon the record, and also for a writ of *Certiorari* to the mayor and aldermen, commanding them to certify as to the custom pleaded[z].

---

[x] Roll. Ab. tit. Cust. Lond. E. 4; Vin. Ab. *id. ib.*; Bohun, 267; Com. Dig. Att. H.; *Spink* v. *Tennant*, 1 Roll. Rep. 105.

[y] *Westoby* v. *Day*, 22 Law Jor. Rep. (NS.) Q. B., 425; S. C. 2 E. and B. 621.

[z] *Leathersellers Company* v. *Brecon*, T. Jones, 149; *Crosby* v. *Hetherington*, 5 Scott, N. R. 653; and see notes to pp. 658 *et seq.* for the authorities relative to the *Certiorari* and return; *Westoby* v. *Day*, *ut supra*; Forms Nos. 55, 56.

CHAPTER XIII.

OF THE SEQUESTRATION.

A SEQUESTRATION is an attachment of the property of a person [a], in a warehouse or other place belonging to and abandoned by him: it has the same objeet as the ordinary attachment, *viz.*, to compel the appearance of the defendant to an action; and it is open to all the incidents of an attachment, as to the rights of the parties. The difficulty in this proceeding appears to be in determining what constitutes an abandonment of the premises by the defendant, sufficient for a sequestration to lie, and, as no positive rule can be laid down, each case must rest solely upon its own merits. It may, however, be suggested that if a man by his ordinary trade or calling is by himself or servants in constant communication with his warehouse or premises, and without any apparent reason discontinues such communication, and is not to be found there by himself or servants, nor any person on the premises to answer for him, the warehouse being locked and apparently forsaken, such a person may be considered fugitive within the meaning of the custom of sequestration [b].

To prevent fraud against the defendant, the plaintiff is bound, besides making the usual affidavit of debt, to swear [c]

---

[a] *Lex Londinensis*, 38; Bohun, 281; Ashley, 110.

[b] Ashley, page 110, says "The doctrine and practice of the Mayor's "Court is to consider the absence of the defendant, and all others, from the "premises as conclusive of the absconding, so that the moment he quits "his house or warehouse, leaving no person therein, either of them may "be sequestered. The consideration of how far this doctrine and practice "is conformable to the custom of the city and to law, belongs to the pro-"ceedings of the defendant."

[c] Form No. 57.

that he believes the defendant has abandoned his premises or is fugitive.

It may easily be supposed that proceedings under this custom are very rarely taken, and there do not appear any records or proceedings, describing with any minuteness the operation of the custom; but, with the knowledge that it is for the same end as an ordinary attachment, the practice may easily be traced.

An action must be entered in the same manner as in an attachment. An affidavit of the plaintiff's debt must also be prepared, which with the affidavit before described must be filed in the office of the court. It is said that the defendant is not called[d] upon this action, but the plaintiff suggests that the defendant has property in the warehouse, *&c.*, and prays that he may be attached thereby. This, as in the attachment, is a fiction. Immediately the action is entered, a precept[e] issues to the serjeant-at-mace, directing him to make a sequestration of the house or warehouse, *&c.* The serjeant then makes the sequestration in these or the like words:

> "I do sequester this warehouse and the goods and chat-
> "tels therein contained, as the proper warehouse, goods,
> "and chattels of A. B., to answer C. D. in a plea of debt
> "upon demand of 120*l.*"

And then must put a padlock upon the door of the house, and set a seal upon the keyhole of the padlock[f].

At the following court, *i. e.* the next day, the serjeant returns that he has made the sequestration; the plaintiff appears, and the defendant is supposed to be called, and the

---

[d] Ashley, 111. It appears doubtful whether a sequestration would now be considered legal without setting out a default of the defendant. No attachment will lie without such default, and the sequestration is to all intents and purposes the same as an attachment. The plaintiff in sequestration prays that the defendant may be "attached" by the said goods, *&c.*, and the goods when appraised are termed "sequestered, attached, and appraised." [e] Form No. 58. [f] Bohun, 281.

default recorded. Three other court days must then elapse, at each of which the defendant is supposed to be called, and making default they are recorded against him. On the fourth day after the fourth default is recorded the plaintiff prays process according to the custom, and thereupon a precept[g] is directed to the serjeant-at-mace, to open the warehouse and cause the goods therein to be appraised. The appraisement is made in the same manner, and subject to the same rules, as the precept to appraise goods in a garnishee's hands. Upon the return of the precept with the affidavit and inventory[h], the plaintiff may make up his record and sign judgment[i], find his pledges to restore, and issue his execution, as in ordinary attachments. The defendant may appear at any time before satisfaction, in the same manner as in an attachment, or he may, after satisfaction is signed, appear by writ of *Scire facias ad disprobandum debitum.*

The property is subject to the rights of other parties not parties to the proceedings, and they may claim their interests under the bill of proof[k].

It appears that the offence of breaking the sequestration was formerly treated very summarily, and the offender was committed to prison by the court[l]; probably however now it would be held to be an indictable offence, as taking goods from out of the custody of the law, similar to pound-breach[m].

It appears that a sequestration may also be made of the warehouse or place belonging to a dead man, either as against him or on an action against the executor or administrator.

The landlord is entitled to have any rent in arrear, to the extent of two years, paid out of the property sequestered[n].

---

g Form No. 59.
h Form No. 60.
i Form No. 61.
k Emerson, City Courts.
l *Quidam commissus fuit prisone, eo quod fregit sequestram,* C. 5.
m Russell on Crimes, cap. 31, § 1.
n *Liber Albus,* 194, 195.

FORMS OF PROCEDURE.

FORMS OF PROCEDURE.

I.

Affidavit of Debt to ground an Attachment.

In the Mayor's Court, London.

I A. B. (*a*) of ———— (*b*) make oath and say, that C. D. is justly and truly indebted to me [*or* to me and to J. K., *or* to J. K. and to X. E. T. of, &c.] in the sum of —— pounds (*c*), for, &c. [*Here state the nature of the debt. See various forms post.*]

Sworn at the Mayor's Court Office, London, this —— day of ——— 18—: before me (*d*).

[*If Affidavit sworn by a Foreigner, the following will be the form of the Jurat*]:

Sworn at the Mayor's Court Office, London, the —— day of ——— 18—, by the deponent [A. B.], the contents of the above affidavit having been first read over and explained to him in the [French] language, by [*name of interpreter*] of [*address and occupation of interpreter*], who was first sworn duly to interpret the same: before me, &c.

[*If the Affidavit be sworn by a person unable to write his name, or otherwise appears to be illiterate, the Jurat will be as follows*]:

Sworn at the Mayor's Court Office, London, the —— day of ——— 18—, before me. And I do hereby certify that the above affidavit was first read over in my presence to the abovenamed A. B., and that he seemed perfectly to understand the same, and made his mark thereto in my presence.

(*a*) The creditor, or some person having a positive knowledge of and competent to swear to the existence of the debt.

(*b*) The deponent's address and trade, profession, or calling.

(*c*) Where the exact amount of the creditor's debt is unascertained, a sum certain "and upwards" may be sworn to.

(*d*) As to whom the affidavit may be made before, see *ante*, pp. 71, 72.

Affidavit of Debt due to or from a surviving Partner.

That C. D. [surviving partner of E. F. now deceased] is justly and truly indebted unto me [as the surviving partner of G. H. now deceased] in the sum of —— pounds, for goods sold and delivered by me [and the said G. H. in his lifetime] to the said C. D. [and the said E. F. in his lifetime] at his [*or* their] request [*or as the case may be*].

Affidavit of Debt due to or from an Executor or Administrator.

That C. D. [*or* C. D. executor of the last will and testament of S. T. deceased, *or* administrator of all and singular the goods, chattels, rights, and credits which were of S. T. at the time of his decease, who died intestate] is and stands justly and truly indebted to me [*or* to me *or* to J. K. as executor, *&c. as above*, *or* administrator, *&c. as above*] in the sum of —— pounds, for goods sold and delivered by me [*or* by the said S. T. in his lifetime] to the said C. D., [*or* to the said S. T. in his lifetime,] at his request, [*or as the case may be*].

Affidavit by or against Husband and Wife, of Debt due to or from Wife before Marriage.

That C. D. [and C. his wife] is [*or* are] justly and truly indebted to me [and to C. my wife] in the sum of —— pounds, for goods sold and delivered by me [*or* by my said wife whilst she was sole and unmarried] to the said C. D. [*or* to the said wife of the said C. D. whilst she was sole and unmarried] at his [*or* her] request [*or as the case may be*].

Affidavit by a Registered Public Officer, of Debt due to a Banking Company.

That I am one of the Registered Public Officers of certain persons united in copartnership for the purpose of carrying on the trade and business of bankers in England, under the name style or firm of ————, according to the provisions of the statute made and passed in the seventh year of the reign of his late Majesty King George the Fourth, for the better regulation of copartnerships of certain bankers in England. And I further say, that C. D. is justly and truly indebted unto the said copartnership in the sum of —— pounds, for [*here state the nature of the debt*] ; and I further say, that as such public officer as aforesaid I am entitled to sue for the said sum of —— pounds, for and on behalf of the said copartnership.

Affidavit of Debt against a Registered Public Officer of a Banking Company.

That certain persons united in copartnership [*&c. as in preceding form*] are justly and truly indebted to me in the sum of —— pounds, for [*here state the nature of the debt*]; and I further say, that C. D. is one of the Registered Public Officers of the said copartnership, and entitled to be sued for and on behalf of the said copartnership.

Affirmation or Declaration in lieu of Affidavit by a person objecting from conscientious motives to be sworn (*a*).

In the Mayor's Court, London.

I A. B. of *&c.*, do solemnly, sincerely, and truly affirm and declare that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely, and truly affirm and declare that C. D. is justly and truly indebted to me in the sum of —— pounds, for, *&c.* [*State the nature of the debt as in an affidavit*].

Affirmed or declared, *&c.* [*similar form to a Jurat to an Affidavit, using the term* "affirmed" *or* "declared" *instead of* "sworn," *&c*].

Affirmation in lieu of Affidavit, by a Quaker.

In the Mayor's Court, London.

I A. B. of, *&c.*, being one of the people called Quakers, do solemnly, sincerely, and truly affirm that C. D. is justly and truly indebted to this affirmant [*or* to J. K. of, *&c.*] in the sum of —— pounds, for, *&c.* [*Here state the nature of the debt as in an affidavit*].

Affirmed, *&c.* [*See preceding Form*].

Affidavit verifying Affidavit of Debt made before a Magistrate in any county in England, or in Scotland, or Ireland.

In the Mayor's Court, London.

I ——— of ——— make oath and say that I know and am well acquainted with the handwriting of ———, and that the said ——— is one of Her Majesty's Justices of the Peace in and for the town of ——— in the county of ——— in England [*or* one of the judges of the Supreme Court of Scotland, *or* one of Her Majesty's Justices of the Peace in and for the town of ——— in that part of the United Kingdom of Great Britain and Ireland called Scotland, *or* Ireland], and duly authorized to administer oaths, and that the name or signature, and addition "———" set or subscribed to the affidavit of —— —— hereunto annexed, is of the proper handwriting of the said ———, as this deponent verily believes.

Sworn at the Mayor's Court Office, London, this —— day of ——— 18—: before me, *&c.*

(*a*) Common Law Procedure Act, 1854, § 20.

Statements of Cause of Action.

For Goods.

For goods sold and delivered [*or* goods bargained and sold] by me to the said C. D. at his request.

For Board and Lodging.

For meat, drink, washing, lodging, and other necessaries provided by this deponent for the said C. D. [*or* for ———— *or* for divers persons] at the request of the said C. D.

For Freight.

For freight payable by the said C. D. to me this deponent, for the carriage and conveyance of goods and chattels in and on board a certain ship or vessel belonging to this deponent [*or* whereof this deponent was master], from ——— to ——— at the request of the said C. D.

For Lighterage.

For lighterage of goods and chattels conveyed by me this deponent in lighters and other vessels, and shipped and landed out of the same, for the said C. D. at his request.

For Money Lent or Paid.

For money lent by this deponent to [*or* money paid by this deponent for the use of] the said C. D. at his request.

For Money Received.

For money received by the said C. D. for the use of this deponent.

Account Stated.

For money found to be due from the said C. D. to this deponent, on an account stated between them.

Interest.

For interest upon certain monies payable to this deponent from the said C. D., and which interest the said C. D. contracted and agreed to pay to this deponent, and became due at a day now past.

For Work as an Attorney and Solicitor.

For work done as an attorney and solicitor, and materials for the same provided by me, for the said ———— upon his retainer, and for fees due and payable to me in respect thereof.

For Demurrage.

For the use of a ship or vessel of this deponent [*or* whereof this deponent was master] retained and kept on demurrage and otherwise for a long time now elapsed, by the said C. D. at his request.

For Work and Materials.

For work done and materials for the same provided by this deponent as a [builder] for the said C. D. at his request.

For Salary or Wages.

For salary [*or* wages] due and payable from the said C. D. to me this deponent for the service of this deponent done for the said C. D. as clerk [*or* servant] to the said C. D. on his retainer.

For Premiums of Insurance.

For premiums due and payable by the said C. D. to this deponent for insuring ships and vessels [*or* goods] by this deponent for the said C. D. at his request.

For Rent.

For the use and occupation of a dwelling-house and premises with the appurtenances [*or* certain apartments] of this deponent, held and enjoyed by the said C. D. at his request, as tenant thereof to this deponent, for a time now elapsed.

For Wharfage, &c.

For wharfage and warehouse room of goods and chattels, deposited, stowed, and kept in and upon a wharf, warehouse, and premises of this deponent, for the said C. D. at his request.

On an Award.

Upon and by virtue of a certain award made by ———— upon a certain submission made by this deponent and the said C. D. to the award, order, and determination of the said ———— of and concerning all matters in difference then depending between this deponent and the said C. D., and upon and by virtue of which said reference the said ———— awarded that the said C. D. should pay to this deponent at a day now past the sum of —— pounds, and the charges of the said ———— in respect of the said reference and award, amounting to the sum of —— pounds, and making with the said sum of —— pounds the said sum of —— pounds, which said lastmentioned sum is still wholly unpaid.

Or,

Upon and by virtue of a certain award [*or* umpirage] made by ———— upon a certain submission made by this deponent and the said C. D., and which said sum of —— pounds was directed by the said award [*or* umpirage] to be paid by the said C. D. to this deponent at a day now past.

On a Bill of Exchange.

For principal money due upon and by virtue of a bill of exchange for that amount (*a*), drawn by me upon and accepted by the said C. D., payable to the drawer's order at a day now past (*a*), and which bill is now in the hands of this deponent overdue and unpaid.

(*a*) If interest is payable by the bill or note, or if the bill or note be payable on demand, state the fact.

On a Promissory Note.

For principal money due upon and by virtue of a promissory note for that amount (*a*), made by the said C. D. payable to me [*or* my order] at a day now past (*a*), which note is now in my hands overdue and unpaid.

[*From the above Forms an affidavit of debt by a payee or indorsee of bill or note against the drawer, acceptor, maker, or indorser, on non-payment of bill or note, or non-acceptance of bill, may be easily framed, stating the drawing, making, acceptance, or indorsement, as the case may be; and adding, where the debt is due from an indorser, the default by the party on whom the bill is drawn, or by whom the note is made, as* "and which said bill (*or note*) has been duly presented to and refused (*acceptance or payment*) by the said C. D."].

On a Foreign Bill of Exchange.

For principal money (*b*) upon and by virtue of a bill of exchange drawn by the said C. D. in parts beyond the seas, that is to say, at ——————, upon ——————, for the payment of [—— francs] to the order of the said C. D. at a day now past, and by him indorsed to E. F., and by the said E. F. indorsed to this deponent, and which said bill has been refused payment by the said ——————, and the same has been duly protested for such non-payment, and is now in my hands overdue and unpaid; and I further say that the said sum of [—— francs] in the said bill mentioned, at the time of the drawing the said bill, were and still are of the value of —— pounds of lawful money of Great Britain.

On a Cheque.

For principal money due to this deponent, as the payee [*or* bearer] of a banker's cheque drawn by the said C. D. on Messrs E. F. and Co., for the payment of —— pounds to this deponent or bearer on demand [*or* for the payment of —— pounds to G. H. or bearer on demand, and by the said G. H. transferred and delivered to this deponent], and which said cheque hath been refused payment by the said Messrs E. F. and Co., and is now in the hands of this deponent unpaid.

On a Policy of Insurance.

Upon and by virtue of a certain policy of insurance on a certain ship of this deponent, on a voyage from —————— to ——————, and which said policy was underwritten by the said C. D.; and deponent further saith that the said ship was lost on the said voyage, and that a loss on the said policy has been adjusted and signed by the said C. D., amounting to the said sum of —— pounds.

On an Agreement or Guarantee.

Upon and by virtue of a certain memorandum in writing, signed by the said C. D., whereby he promised to pay to this deponent the said sum of —— pounds, which sum became due and payable at a day now past.

(*a*) If interest is payable by the bill or note, or if the bill or note be payable on demand, state the fact.

(*b*) If interest is made payable by the bill, state the fact.

On a Bond.

For principal money [and interest] due upon and by virtue of a bond made and entered into by the said C. D. to this deponent, in the penal sum of —— pounds, conditioned for the payment of —— pounds [with interest for the same] at a day now past, [*or* conditioned for the payment of the sum of —— pounds ayear to this deponent (*or as the case may be*), and which sum of —— pounds became due and payable at a day now past].

On a Bond by Assignee.

Is justly and truly indebted to E. F., in trust for this deponent, in the sum of —— pounds, for principal money [and interest] due upon and by virtue of a bond made and entered into by the said C. D. to the said Q. R., in the penal sum of —— pounds, conditioned for, *&c.* [*set out the terms of the bond as in preceding Form*], and which bond and the monies due and to grow due on the same, have been duly assigned by the said E. F. to this deponent.

On a Deed generally.

Upon and by virtue of an indenture made between the said C. D. of the one part and this deponent of the other part, whereby the said C. D. covenanted to pay to this deponent the said sum of —— pounds at a day now past.

For Rent on a Lease.

For the arrears of a yearly rent of —— pounds upon and by virtue of an indenture of lease made between this deponent of the one part and the said C. D. of the other part, and which rent became due at a day now past.

On an Annuity Deed.

Upon and by virtue of an indenture made between the said C. D. of the one part and this deponent of the other part, whereby the said C. D. covenanted to pay to this deponent a certain annuity or yearly sum of —— pounds; and deponent further saith that —— yearly payments of the said annuity have become due and payable, amounting to the said sum of ——.

Upon a Judgment.

Upon and by virtue of a judgment of Her Majesty's Court of ——— whereby this deponent recovered against the said C. D. the said sum of —— pounds at a certain day now past, which judgment is still in full force unreversed and wholly unsatisfied.

II.

Præcipe, Entry of Action.

In the Mayor's Court, London.

—— day of ——— 18—.

C. D. defendant, at the suit of A. B. plaintiff, in a plea of debt upon demand [*or* upon record, *or as the case may be*] of —— pounds of lawful money of Great Britain.

G. H.
Plaintiff's Attorney,
of ———

Sworn £

III.

Attachment Paper.

To E. F. [*the garnishee*].

—— day of ——— 18—.

Take notice that by virtue of an action entered in the Lord Mayor's Court, London, on the —— day of ——— 18—, against C. D. defendant, at the suit of A. B. plaintiff, in a plea of debt upon demand of ——— [*the same as in the action*], I do attach all such monies, goods, and effects as you now have or which hereafter shall come into your hands or custody of the said defendant, to answer the said plaintiff in the plea aforesaid, and that you are not to part with such monies, goods, or effects without license of the said court.

Sworn £

G. H.
Plaintiff's Attorney,
of ———

X. Y.
Serjeant-at-mace,
Lord Mayor's Court Office.

IV.

Scire facias, or Summons on Attachment.

To E. F. [*the garnishee*].

You are hereby summoned to be and appear in the Queen's Majesty's Court, to be holden before the Mayor and Aldermen in the Chamber of the Guildhall of the City of London, on ——— (*a*), the —— day of ———, at ten of the clock in

---

(*a*) The second or any further subsequent day from the service of *Sci. fa.*, excluding Sunday.

the forenoon, to show cause why A. B. [*plaintiff*] shall not have judgment against you for —— pounds (*b*) heretofore attached in your hands as the proper monies [*or* goods and chattels] of C. D. [*defendant*]. And hereby take notice, that if you do not appear judgment will be entered against you for the same. Dated at the Guildhall, London, the —— (*c*) day of ——— 18—.

G. H.
Attorney for the Plaintiff,
of ———

X. Y.
Serjeant-at-mace.

V.

In the Mayor's Court, London.

——————— by ——————— his attorney, demands against ———————, —— pounds (*d*) of lawful money of Great Britain, which he owes to and unjustly detains from the said plaintiff: for that whereas the said defendant, on the —— (*e*) day of ———, in the —— year of the reign of Her present Majesty Queen Victoria, at the parish of St. Helen, London, and within the jurisdiction of this court, for and in consideration of divers sums of money before that time due and owing from the said defendant to the said plaintiff, at the parish aforesaid and within the jurisdiction aforesaid, and then being in arrear and unpaid, granted and agreed to pay to the said plaintiff the said sum of —— pounds above demanded, where and when he the said defendant should be thereunto afterwards required; yet notwithstanding the said defendant, although often thereto requested, hath not yet paid to the said platintiff the said sum of —— pounds above demanded, or any part thereof, to the damage of the said plaintiff twenty shillings; and therefore he brings his suit, *&c.*

(*f*) Sworn £ (*g*) —— day of ——— 18 —.

(*b*) If the attachment be for goods, say "why A. B. should not have judgment against you for the appraisement of, *&c.* [*set out the goods*]."

(*c*) The fourth day after the day of service of the attachment, not including Sunday.

(*d*) The amount here stated must be the amount inserted in the action as entered.

(*e*) A nominal day, the day before the action was entered.

(*f*) The amount sworn to in the affidavit.

(*g*) The day of the entry of the action.

VI.

Garnishee's Warrant and Imparlance.

And appears and appoints in his stead ———— his attorney, and hath leave to imparle until, &c.

VII.

Plaintiff's Warrant.

—— day of ——— 18— [*day of action*].

The plaintiff appoints in his stead ———— his attorney.

VIII.

Demand of Plea.

In the Mayor's Court, London.

Plaintiff.
Garnishee.
Defendant.

The plaintiff demands a plea herein, or judgment. Dated this —— day of ——— 18—.

By yours, &c.,

G. H.
Plaintiff's Attorney,
of ———

To Mr. ————
Garnishee's Attorney.

IX.

Venire facias.

Therefore let a jury be summoned according to the custom, &c., And at the same court a precept is directed to ————, one of the serjeants-at-mace of the said court, that he according to the custom, &c., summon to the said court to be held on the —— day of ———— then next, twenty-four, &c., by whom, &c., and who neither, &c., to recognize, &c., because as

well, *&c.*, And the same day is given to the plaintiff and garnishee aforesaid, to be there, *&c.*

X.

Postea, and Verdict for Plaintiff.

Afterwards, that is to say, on the —— day of ———, in the —— year of the reign of our Sovereign lady Queen Victoria, the jurors of the jury aforesaid being solemnly called, twelve of them appeared, who being elected, tried, and sworn upon the said jury to declare the truth of and concerning the premises, and to try the issue joined between the said parties in the plea aforesaid, for their verdict on their oath say,

For the whole of Monies attached.

That at the time of making the attachment aforesaid the said garnishee had owed to and detained from, and yet has, owes to, and detains from the said defendant named in the bill original and attachment aforesaid, the said —— pounds, as the proper monies of the said defendant, in manner and form as the said plaintiff by his attachment hath above supposed. Therefore, *&c.* [*See Form of Judgment.*]

For part of Monies attached.

As to —— pounds, part of the said —— pounds in monies numbered above-mentioned to be attached, that at the time of making the attachment aforesaid the said garnishee had owed to and detained from, and yet has, owes to, and detains from the said defendant named in the bill original and attachment aforesaid, the said —— pounds, as the proper monies of the said defendant, in manner and form as the said plaintiff by his attachment aforesaid hath above supposed; and as to —— pounds residue (*a*) of the said —— pounds, the jury aforesaid upon their oath aforesaid further say, that the garnishee, at the time of making the said attachment, or at any time since, had not owed to or detained from, nor yet has, owes to, or detains from the said defendant the said —— pounds or any part thereof, in manner and form as the said plaintiff by his said attachment hath above supposed. Therefore, *&c.*

For Money, Debitum in præsenti solvendum in futuro.

That the said garnishee was indebted to the said defendant in the sum of —— pounds; but that the said sum of —— pounds does not become due and payable by the said garnishee to the said defendant until the —— day of ——— next.

(*a*) When part only is found for the plaintiff, the remainder must be negatived, or it will be an imperfect verdict. *Bellamy* v. *Upton*, 1 Shower, 359, case 229.

For Goods.

That at the time of making the attachment aforesaid the said garnishee had and detained from, and yet has and detains from the said defendant named in the bill original and attachment aforesaid, the said ——— as the proper goods and chattels of the said defendant, in manner and form as the said plaintiff by his attachment hath above supposed. Therefore, *&c.* [*See Form of Judgment of Appraisement.*]

For part of Goods attached.

As to ———, part of the said goods and chattels abovementioned to be attached, that at the time of making the attachment aforesaid the said garnishee had and detained from, and yet has and detains from the said defendant named in the bill original and attachment aforesaid, the said ——— as the proper goods and chattels of the said defendant, in manner and form as the said plaintiff by his attachment aforesaid hath above supposed; and as to ———, residue (*a*) of the said goods and chattels abovementioned to be attached, the jury aforesaid upon their oath aforesaid further say, that the garnishee at the time of making the said attachment, or at any time since, had not or detained from, nor yet has or detains from the said defendant the said ——— or any part thereof, in manner and form as the said plaintiff by his said attachment hath above supposed. Therefore, *&c.* [*See Form of Judgment of Appraisement.*]

For Monies and Goods.

That at the time, *&c.*, [*as in form of Verdict for Plaintiff for Monies, to the words* "hath above supposed," *and then as follows*] and the jury aforesaid upon their oath aforesaid further say, that the garnishee at the time," *&c.*, [*conclude as in form of Verdict for Plaintiff for Goods*]. Therefore, *&c.* [*See Form of Judgment in the case of Monies and Goods attached.*]

For part of Monies and part of Goods attached, or for the whole of one and part of the other.

[*The Form of* Postea *to meet these cases may be easily constructed from the preceding Forms, stating the affirmative or negative of the issue in respect to either the monies or goods, in part or in all, as directed in the preceding Forms, as the case may be.*]

Property in Boxes, &c.

[*Where the attachment is for property in cases or boxes locked, &c., the jury must find the number and description of cases as detailed in the record, and the judgment of the court will be to open them, and appraise the contents.*]

(*a*) See note, p. 161.

Garnishee's Lien.

[*If the garnishee has a lien upon the goods, the jury must find the amount due, as follows*:]

And the jury aforesaid upon their oath aforesaid further say that the said garnishee has a claim or lien upon the said goods and chattels, amounting to the sum of —— pounds.

XI.

Judgment Docquet.

In the Mayor's Court, London.

Plaintiff.
Garnishee.
Defendant.

Action entered —— day of ——— 18—.
Debt, £ Sworn, £
Judgment by default (*a*) for £
—— day of ——— 18—.

G. H.
Plaintiff's Attorney,
of ———

XII.

Judgment for Plaintiff on Verdict, for Money.

Therefore it is considered by the Court that the said plaintiff have execution of the said —— pounds in monies numbered, so attached as aforesaid [and by the jury found as aforesaid (*b*), subject to the garnishee's lien of —— pounds as aforesaid] by pledges, *&c.*, if the defendant, *&c.*, and process for the remainder, *&c.*

(*a*) If the judgment be for want of plea, or on withdrawal of plea, say "judgment for want of plea," or "on withdrawal of plea."
If for plaintiff on verdict, say "judgment for plaintiff on verdict."
If for appraisement of goods, say "judgment of appraisement;" and where the judgment is final, say "final judgment of goods appraised at —— pounds."
(*b*) Omitted when the judgment is by default.

XIII.

Entry of Satisfaction on the Record of Attachment.

And the said plaintiff here in court, according to the custom, *&c.*, found sufficient pledges to restore, *&c.*, if the defendant, *&c.*, that is to say ——— and ——— [*here insert the christian and surnames of the pledges to restore*]; and thereupon a precept for that purpose being delivered to the said serjeant-at-mace, the said plaintiff had execution of the said —— pounds in monies numbered, so attached and condemned as aforesaid [*or in case of goods, say* the said plaintiff had execution of the said goods and chattels so attached and appraised as aforesaid, at the sum of —— pounds; *and if the garnishee have a lien on the goods, add* subject to the garnishee's lien thereon of —— pounds], and thereof hath acknowledged himself satisfied.

XIV.

Judgment of Appraisement of Goods, either by Default or on Verdict.

Therefore it is considered by the Court that an appraisement be made of the said goods and chattels, to wit, the said ——— so attached as aforesaid; whereupon, at the further petition of the said plaintiff made to the said court by his said attorney, it is by the same Court commanded to the said serjeant-at-mace that he cause the said goods and chattels

[*or* the said ———, *describing the goods specifically where only part of the goods are found by the jury; or, where packages are attached, describe them as follows, e.g.*: "Two packages (or boxes), marked respectively A and B, to be opened in his presence, and the same and the goods and chattels therein contained,"]

to be appraised in the presence of him the said serjeant-at-mace according to the custom of the said city, so that he have an appraisement thereof here in court, on the —— day of ———.

For Monies and Goods in one Attachment.

Therefore, *&c.*, [*as in Form No.* XII. *to the end, and then continue as follows*] "And it is further considered by the Court that an appraisement be made," *&c.*, (as directed *supra*).

XV.

Precept of Appraisement of Goods attached.

In the Mayor's Court, London.

To ————, one of the serjeants-at-mace of the said court, or to any other serjeant-at-mace.

It is commanded, that according to the custom of the city of London you do cause [(*a*) two bales of wool, marked respectively A and B,] to be appraised in your presence, upon the oaths of two freemen of the city of London, as the proper goods and chattels of ——— defendant, heretofore attached in the hands and custody of ——— garnishee, at the suit of ——— plaintiff, so that you have an appraisement thereof here in court without delay. Dated at the Guildhall, London, this —— day of ——— 18—.

G. H. [Registrar.]

Plaintiff's Attorney,
of ———

XVI.

Precept to open Boxes and Appraise the contents.

Where the property is contained in boxes locked or fastened, instead of the words between the [ ], *insert* "the two boxes and packages marked respectively Y Z to be opened in your presence, and the said boxes and packages, and the goods and chattels therein contained."

XVII.

Inventory and Appraisement of Goods attached.

In the Mayor's Court, London.

An inventory and appraisement taken and made this —— day of ——— 18—, by ——— of ————, and ——— of ————, of [two bales of wool, marked respectively A and B, *or, in the case of packages or boxes locked,* two packages or boxes, marked respectively Y and Z (*b*)], lately attached in this court by ———— plaintiff, in the hands

---

(*a*) This must follow precisely the language of the finding of the jury.
(*b*) This must be in the precise terms of the precept.

and custody of ——— garnishee, as the proper goods and chattels of ——— defendant [*in case of packages, &c., add here* and of the goods and chattels therein contained, namely, 1000 yards of lace], which said goods and chattels [*in case of packages, &c., add* together with the said two packages or boxes,] are valued and appraised at the sum of —— pounds.

Sworn by the said ——— and ———, at the Mayor's Court Office, London, this —— day of ——— 18—: before me, &c.

XVIII.

Entry of Appraisement upon the Record.

On which day the serjeant-at-mace returned and certified to the said court, that he, by virtue of the said precept to him directed, had caused the said goods and chattels [*or* the said ———, *or* the said two packages or boxes marked respectively A and B, to be opened, and the same and the contents thereof, that is to say (*describe the property*)], to be appraised on the oaths of —— and ——, freemen of London, to the value of —— pounds, which said appraisement the said serjeant-at-mace has ready here in court as to him above commanded; and thereupon the said plaintiff prays execution of the said goods and chattels to be awarded to him, &c. [*If the garnishee have a lien, add here* subject to the garnishee's lien of —— pounds].

XIX.

Final Judgment for Goods Appraised.

Therefore it is considered by the Court that the aforesaid plaintiff have execution of the said goods and chattels so attached and appraised as aforesaid [*or* the said goods and chattels so by the jury aforesaid found and valued as aforesaid (*as the case may be*), *and if the garnishee claim a lien, add* subject to the garnishee's lien of —— pounds], by pledges, &c., if the defendant, &c., and process for the remainder, &c.

XX.

Execution against Garnishee.

To ————, serjeant-at-mace, *&c.*, or to any other serjeant-at-mace.

By the Mayor, *&c.*

We command you that you take ————, if he be to be found within the liberties of the city of London, and him safely keep, so that you have his body here in court without delay, to satisfy ———— [the sum of —— pounds, *or* certain goods and chattels, that is to say (*set out the goods precisely in the language of the judgment* No. xiv.)], heretofore attached and appraised at the sum of —— pounds in his hands, at the suit of the said ————, as the proper monies [*or* goods and chattels] of ———— defendant, by due process of attachment and judgment of the court here before us recovered against him the said ———— and have you the said ————, or the said monies [*or* goods and chattels or the value thereof] here in court, without delay, to render to the said ————, according to the tenour and effect of the said judgment thereof given. And this you are not to omit on the peril incumbent, and have you there this precept. Dated in the Chamber of the Guildhall of the city of London, this —— (*a*) day of ———— in the year of our Lord 18—.

[Registrar.]

XXI.

Venire of the Jury.

Same Form as No. ix.

XXII.

Verdict for Garnishee.

Afterwards [*&c. as* ante, *on verdict for plaintiff, to the words* "on their oath say," *and then thus, where money is attached*]:

That at the time of making the said attachment, or at any time since, the said garnishee had not owed to or detained from, nor yet has, owes to, or detains from the said defendant named

(*a*) Day of signing judgment.

in the bill original and attachment aforesaid, the said —— pounds in monies numbered as the proper monies of the said defendant, or any part thereof, in manner and form as the said plaintiff has above supposed. Therefore, *&c.* [*See Form of Judgment.*]

Where Goods are attached.

That at the time of making the said attachment, or at any time since, the said garnishee had not or detained from, nor yet has or detains from the said defendant named in the bill original and attachment aforesaid, the goods and chattels aforesaid, or any part thereof, as the proper goods and chattels of the said defendant, in manner and form as the said plaintiff has above supposed. Therefore, *&c.*

Where both Money and Goods are attached.

That at the time of making the said attachment, or at any time since, the said garnishee had not owed to or detained from, nor yet has, owes to, or detains from the said defendant named in the bill original and attachment aforesaid, the said —— pounds as the proper monies of the said defendant or any part thereof, or the said goods and chattels as the proper goods and chattels of the said defendant or any part thereof, in manner and form as the said plaintiff has above supposed. Therefore, *&c.*

XXIII.

Judgment for Garnishee on Verdict.

Therefore it is considered by the Court that the said plaintiff take nothing by his attachment aforesaid, and that the said garnishee go acquitted thereof without a day, *&c.*

XXIV.

Docquet, Judgment for Garnishee.

In the Mayor's Court, London.

Plaintiff.
Garnishee.
Defendant.

Action entered —— day of —— 18—.
Judgment for garnishee (*a*).
—— day of —— 18—.

G. H.
Garnishee's Attorney,
of ——

(*a*) "On Verdict" *or* "for want of prosecution" *as the case may be.*

XXV.

Appearance of Garnishee.

In the Mayor's Court, London.

Plaintiff.
Defendant.
Garnishee.

Action entered —— day of —— 18—.
Appearance of garnishee —— day of —— 18—.

G. H.
Garnishee's Attorney,
of ———

Notice thereof.

—— day of ——— 18—.

In the Mayor's Court, London.

——— against ———

Sir,—Take notice that I have entered an appearance for the garnishee herein.

To Mr. ———
Plaintiff's Attorney.

Yours, *&c.*, G. H.
of ———

XXVI.

Plea of Garnishee, Nil habet, generally.

In the Mayor's Court, London.

Plaintiff, against Garnishee.
Defendant.

And the said garnishee, by —— his attorney, on the —— day of ——— in the —— year of the reign aforesaid, comes and says that the plaintiff ought not to have execution of the said —— pounds in monies numbered [*or if attachment be for goods only, say* ought not to have judgment of appraisement of the said goods and chattels; *or, if the attachment be for both money and goods, say* ought not to have execution of the said —— pounds in monies numbered, or judgment of appraisement of the said goods and chattels], so attached as aforesaid, or any part thereof, because he says that at the time of making

the said attachment, or at any time since, he had not owed to or detained from, nor yet has, owes to, or detains from the said defendant named in the bill original and attachment aforesaid, the said —— pounds or any part thereof [*or, in case of goods*, he had not or detained from nor yet has or detains from, *&c.* the said goods and chattels or any part thereof; *or in case of money and goods*, he had not owed to or detained from, nor yet has, owes to, or detains from, *&c.* the said —— pounds or any part thereof, or the said goods and chattels or any part thereof], in manner and form as the plaintiff by his said attachment hath above supposed, and of this he puts himself upon the country, *&c.*

G. H.
Garnishee's Attorney,
of ———

Plea of Garnishee, Nil habet at the time of Attachment made.

[Where the record charges the garnishee with owing money to the defendant only at the time of the attachment made, it would appear that the garnishee might plead denying the indebtedness of the garnishee at the time of the attachment without denying that he became indebted after the attachment made, as follows:]

And the said garnishee by ——— his attorney, on the —— day of ———, comes and says that the said plaintiff ought not to have execution of the said monies or any part thereof so attached as aforesaid, because he says that at the time of making the said attachment he had not owed to or detained from, and did not owe to or detain from the said defendant named in the bill original and attachment aforesaid the said monies or any part thereof, in manner and form as the said plaintiff by his attachment has above supposed, and of this the garnishee puts himself upon the country, *&c.*

G. H.
Garnishee's Attorney,
of ———

[*See* post, *Form of Record.*]

XXVII.

Plea of Garnishee, Debitum in præsenti solvendum in futuro.

[Although a garnishee might plead this specially, it does not appear requisite, as he could give evidence under the plea of *nil habet*, that the debt was not due at the time of plea pleaded, the jury would therefore find specially according to the fact, and the judgment would be in pursuance of the verdict.]

XXVIII.

Notice of putting in Bail in Dissolution of Attachment.

In the Mayor's Court, London.

Between **Plaintiff.**
Defendant.
Garnishee.

Take notice, that it is the intention of the abovenamed defendant to put in bail at the suit of the abovenamed plaintiff, and in dissolution of the attachment made in the hands of the abovenamed garnishee, and that the names and descriptions of the proposed bail are ——— and ——— (*a*).

And further take notice that the said proposed bail will on the —— day of ———, at —— o'clock in the —— noon (*a*), attend at the office of this court to enter into the required recognizance, and to justify themselves as good and sufficient bail in that behalf. Dated this —— day of ——— 18 —.

To Mr. ——— **Yours, &c., G. H.**

Plaintiff's Attorney. **Defendant's Attorney.**

XXIX.

Execution against Defendant.

To ——— , serjeant-at-mace, &c., or to any other serjeant-at-mace.

By the Mayor, &c.

Take ——— if — be to be found within the liberties of the city of London, and —— safely keep so that you have —— body here in court without delay, to satisfy ——— as well a certain debt of ——, which the said ———, lately in the Queen's Majesty's Court holden before us the said mayor and aldermen in the Chamber of the Guildhall of the said city, recovered against ——, and also ———, which in the said Queen's Majesty's Court holden before us the said mayor and aldermen in the Chamber of the Guildhall of the said city, were adjudged to the said ——— for —— damages sustained, as well by detaining the said debt as for —— costs

---

(*a*) See *ante*, pp. 106, 107.

and charges about —— suit in that behalf expended, whereof the said ——— is convicted, as appears to us the said mayor and aldermen of record. And have there this precept. Dated at the Guildhall, London, this —— day of ——— in the year of our Lord one thousand eight hundred and sixty —.

G. H.

Attorney for the Plaintiff, [Registrar.]
of ———

XXX.

Scire facias against Bail.

In the Mayor's Court, London.

To ————, one of the serjeants-at mace, *&c.*, or to any other serjeant-at mace.

Whereas heretofore, that is to say, on the —— day of ——— in the year of our Lord 18 —, in the —— year of the reign of her present Majesty Queen Victoria, came into the Queen's Majesty's Court, holden before the mayor and aldermen of the city of London in the Chamber of the Guildhall of the said city, situate in Saint Michael Bassishaw in the ward of Bassishaw within the said city, according to the custom of the said city, ———— of ———— in the —— of ———— ————, and ———— of ———— in the —— of ———— ————, in their proper persons, and became pledges and bail, and each of them became pledge and bail, for ————, that if the said ———— should happen to be convicted at the suit of ————, in an action of debt for —— pounds, then lately commenced or depending in the same court by and at the suit of the said ———— against the said ————, then the said bail consented, and each of them consented, that as well the debt aforesaid as all such damages as should be adjudged to the said ———— in that behalf should be made of their and each of their lands and chattels, and levied to the use of the said ————, if that the said ———— and ———— did not have the body of the said ———— forthcoming at the end of the suit, or pay to the said ———— what should be recovered against him the said ————, as by the record of the said recognizance still remaining in the said court more fully appears; and although the said ——— afterwards, to wit, on the —— day of ——— in the year of our Lord

18—, in the said court, by consideration and judgment of the same court, recovered against the said ———— in that action the said debt of —— pounds, as also ————, which in and by the said court were adjudged to the said ———— for his damages which he had sustained as well on occasion of the detention of his said debt as for his costs and charges by him about his suit in that behalf laid out and expended, whereof the said ———— was convicted, as by the record and proceedings thereof still remaining in the said court more fully appears, and which said judgment and also the said recognizance are still in their full force, strength, and effect, and not in the least reversed, annulled, made void, or satisfied, yet the said ———— hath not as yet paid the said debt and damages or any part thereof to the said ————, nor was he forthcoming on the occasion aforesaid, nor have the said ———— and ———— or either of them paid to the said ———— what has been recovered against the said ————, according to the form and effect of the said recognizance, as the said mayor and aldermen have been given to understand: Wherefore the said ———— hath humbly besought the said mayor and aldermen to provide him a proper remedy in this behalf; and the said mayor and aldermen, being willing that what is just in this behalf should be done, command you the said serjeant-at-mace, that by honest and lawful men of the said city you do, according to the custom of the said city, warn and make known to the said ———— and ———— to be and appear in the Queen's Majesty's Court, to be holden before the same mayor and aldermen of the said city in the Chamber of the Guildhall of the said city on ——— the —— day of ———, to show if they have or know, or if either of them hath or knoweth, of anything to say for themselves or himself why the said ———— ought not to have execution against the said ———— and ———— of the debt and damages aforesaid, according to the force, form, and effect of the said recognizance, if it shall seem expedient for him so to do; and further, to do and receive what the said court shall then consider of them in this behalf. And have there then the names of those by whom you shall so make known to them, and this precept. Dated at Guildhall the —— day of ——— 18—.

[Registrar.]

XXXI.

Affidavit of amount of Money in possession of Garnishee.

In the Mayor's Court, London.

Between Plaintiff.
Garnishee.
Defendant.

———— of ———— maketh oath and saith, that at the time of making the attachment herein he had no goods or chattels in his possession belonging to the defendant, and that at the time of making the said attachment he owed to the said defendant, or had in his possession belonging to the said defendant the sum of —— pounds, and no more. And this deponent further saith, that since the making of the said attachment, he has not become indebted to the said defendant, nor has he received on account of the said defendant any further or other sum of money, or any other property, nor is he aware of any other sum of money or property coming into his possession on account of the defendant.

[*If the affidavit is made after plea, it need only mention the amount in hand to the time of plea pleaded.*]

XXXII.

Scire facias ad disprobandum debitum, and Record.

In the Mayor's Court, London.

To ————, one of the serjeants-at-mace of this court, or to any other serjeant-at-mace, &c.

It is commanded that you summon ——— [*the plaintiff*], to be and appear in this court on the —— day of ——— 18—, to show cause why the sum of —— pounds, of and belonging to ——— [*defendant*], and attached by you in the hands of ———, and had and received by the said ——— in pursuance of the judgment of this court of the —— day of ——— 18—, ought not to be restored and paid to the said ——— [*the defendant*] in the said attachment, according to the custom of the said

city; and further, that if he do not appear, judgment will be signed against him by default. And have you there then this precept, *&c.* Dated this —— day of ——— 18—.

G. H.
Defendant's Attorney,
of ———

[Registrar.]

In the Mayor's Court, London.

Whereas heretofore, that is to say, on the —— day of ——— in the —— year of the reign of her present Majesty Queen Victoria, ——— came into this court according to the custom of the same city, and then and there in the same court, according to the custom of the said city, affirmed his certain bill original against ———, in a plea of debt upon demand of —— pounds of lawful money of Great Britain, *&c.*, as appears by the record thereof in the said court, and appointed in his stead ——— his attorney, and then and there prayed process to be granted to him against the said ———, upon his said bill original, and it was then granted according to the custom of the said city: And thereupon it was commanded to ———, one of the serjeants-at-mace and ministers of the said court, that he, according to the custom of the said city, should summon by good summoners the said ———, to be and appear in the same court to answer the said ——— in the plea aforesaid; at which said court the said serjeant-at-mace, according to the custom of the said city, returned and certified to the said court that the said ——— was not to be found within the said city, nor had anything within the liberties thereof whereby he could be summoned: And thereupon the said ———, at the same court, was solemnly called, and did not appear but made default; whereupon the said ——— prayed process of the said court, according to the custom of the said city, to attach the said ——— by his monies being in the hands and custody of ———, so that the said ——— should appear at the then next court to be holden, *&c.*, to answer the said ——— in the plea aforesaid; and afterwards, to wit, on the —— day of ——— aforesaid, the said ——— was attached by ——— in monies numbered, as the proper monies of the said ———, in the hands and custody of the said ——— the garnishee, according to

the said custom, &c. And whereas afterwards, and after divers proceedings had thereon, as by the said record appears, to wit, at a court holden on the —— day of ——— in the —— year of the reign aforesaid, the said ——— recovered judgment against the said ——— for —— pounds, in monies numbered, as the proper monies of the said ——— in his hands and custody; whereupon it was considered by the said court that the said ——— should have execution of the said —— pounds in monies numbered, so attached as aforesaid, by pledges, according to the custom of the said city, to restore, &c., if the defendant, &c., and process for the remainder, &c.; and thereupon the said ——— found pledges so as aforesaid, according to the custom, &c., to wit ——— and ———, and thereupon the said ——— had execution of the said —— pounds, so as aforesaid in the hands and custody of the said ———, and thereupon the said ——— acknowledged himself thereof satisfied: And afterwards, and within a year and a day next after judgment and execution had of the said —— pounds attached as within mentioned, (that is to say), on the —— day of ——— in the —— year of the reign of our Sovereign Lady Queen Victoria, the within named defendant ——— in his own proper person came into court, and then and there, according to the custom of the said city, prayed process to warn the said plaintiff to be and appear in this court to show cause, &c.: Whereupon, at the same court, it is commanded to the said serjeant-at-mace, that he, according to the custom of the said city, warn and make known to the said plaintiff to be and appear here in this court, to be holden, &c., on ——— the —— day of ———, to show cause, &c., why the said defendant should not have restitution of the said —— pounds in monies numbered [*or* of the said goods and chattels, or the value thereof], so in execution had by the said plaintiff as aforesaid; at which said court holden, &c., the said serjeant-at-mace returned and certified that he, by virtue of the said precept to him directed, and according to the custom, &c., had warned and made known to the said plaintiff to be and appear at this court, to show cause, &c., as above commanded; and thereupon, at the same court

XXXIII.

Summons on Scire facias ad disprobandum debitum.

In the Mayor's Court, London.

You are required to be and appear in this court on the —— day of ——— 18—, to show cause why the sum of —— pounds of and belonging to ————, and attached in the hands of ———— and had and received by you in pursuance of the judgment of this court of the —— day of ——— 18—, ought not to be restored and paid to the said ———— in the said attachment, according to the custom of the said city; and take notice, that if you do not appear judgment will be signed against you by default. Dated this —— day of ——— 18—.

X. Y.

To Mr. ———— Serjeant-at-mace.

XXXIV.

Appearance of the Defendant, on Writ of Scire facias ad disprobandum debitum.

[*To be entered, following Form* xxxii.]

the said defendant in his own person appeared, and then and there, according to the custom of the said city, [found pledges and sureties, to wit, ———— and ———— (*if the defendant appears under order of the court by CommonBail, then John Doe and Richard Roe may be inserted*), *or* rendered his body to prison] to plead with the said ———— within mentioned, according to the custom of the said city; and the said ———— then and there appointed in his stead ———— his attorney against the said ———— in the plea aforesaid.

XXXV.

Appearance of the Plaintiff on the Scire facias ad disprobandum debitum.

[*To be entered, following Form* xxxiv.]

And the said plaintiff was solemnly called and appears, and appoints in his stead ———— his attorney.

XXXVI.

Judgment for want of Appearance of the Plaintiff on Scire facias ad disprobandum debitum.

And the said plaintiff was solemnly called and doth not appear, but makes default: Therefore it is considered by the Court that the said defendant go acquitted of the bill original of the said plaintiff aforesaid, and that the said defendant have restitution of the aforesaid —— pounds in monies numbered, so as aforesaid attached and in execution had, *&c.*

XXXVII.

Prayer of Stet Billa.

[*To be entered, following Form No.* XXXV.]

And prays that his bill original may stand, and that the defendant may plead thereto.

[*The prayer of* Stet billa *terminates the proceedings upon the* Scire facias; *but upon the record of the action and attachment, after the satisfaction, the appearance of both plaintiff and defendant must be entered as follows*:]

And afterwards [and within a year and a day after execution had of the said —— pounds attached and condemned as within mentioned, *if so*], that is to say, on the —— day of ——— in the —— year of the reign of our Sovereign Lady Queen Victoria, the within-named defendant in his own proper person came into the court of our said Lady the Queen, and then and there found pledges and sureties [*or as the case may be*], to wit ——— and ——— to plead with the within-named ——— upon the plea of his bill original within mentioned until the end of the same plea, according to the custom of the same city, and then and there appointed in his stead ——— his attorney, and then and there by the said attorney offered himself against the said ——— ready to justify and plead and disprove the debt of the said ——— demanded by his said bill original, or otherwise to discharge himself therefrom, according to the custom of the same city; and at the same court the said plaintiff appears and appoints in his stead ——— his attorney, and prays that his bill original may stand, and that the defendant may plead thereto.

XXXVIII.

Judgment on Verdict: Defendant having appeared by Scire facias ad disprobandum debitum.

[*The* Postea *will be in the form of a verdict for the plaintiff in ordinary actions in the Mayor's Court: and then continue*]

Therefore it is considered by the Court that the aforesaid plaintiff recover against the said defendant his debt and damages aforesaid, by the jury aforesaid in form aforesaid found, and also the further sum of —— pounds for his costs and charges adjudged of increase to the said plaintiff with his assent, which said debt, damages, and costs in the whole amount to —— pounds.

XXXIX.

Judgment of Restitution where the amount recovered under the Attachment exceeds the Debt and Costs.

[*After Form No.* xxxviii. *add*]

And it is further considered by the Court that the said defendant have restitution of the sum of —— pounds, being the balance of the sum of —— pounds in monies numbered, so attached as aforesaid and in execution had, *&c.*

XL.

Judgment of Restitution for the whole amount.

[*The* Postea *will be in the form of a verdict for the defendant in ordinary issues in the Mayor's Court: and then continue*]

Therefore it is considered by the Court that the said defendant go acquitted of the bill original of the said plaintiff aforesaid, and that the defendant have restitution of the aforesaid —— pounds in monies numbered, so as aforesaid attached and in execution had, *&c.*

XLI.

Præcipe for a Rule to Prosecute.

In the Mayor's Court, London.

Plaintiff.
Garnishee.
Defendant.

Action entered —— day of ——— 18—.
Attachment made —— day of ——— 18—.
Rule to prosecute —— day of ——— 18—.

G. H.
Plaintiff's Attorney,
of ———

XLII.

Affidavit of Service of Rule to prosecute Attachment.

In the Mayor's Court, London.

Between Plaintiff.
Garnishee.
Defendant.

I G. H. of, &c., make oath and say, that I did on the —— day of ——— [personally] serve Mr. ——— the attorney for the abovenamed plaintiff in this cause with a true copy of a rule to prosecute this attachment [*if the service be not personal, state how effected, as* by delivering to and leaving the said copy rule with a clerk of the said Mr. ——— at his office situate &c., *or as the case may be*], which said rule is hereunto annexed. And I further say that no copy record or other proceeding has been delivered had or taken in this attachment by or on behalf of the said plaintiff.

Sworn, &c. [*See Form of Jurat*, ante.]

XLIII.

Record and Judgment for want of Prosecution in an Attachment.

In the Mayor's Court, London.

Be it remembered, that an action was entered on the —— day of ———, A.D. 18—, against ——— defendant, at the

suit of ——— plaintiff, in a plea of debt upon demand [*or* upon record, *as the case may be*] of —— pounds of lawful money of Great Britain; and whereas an attachment was on the —— day of ———, A.D. 18—, made thereon in the hands of ——— garnishee, and whereas the said ——— [*garnishee*] appeared to the said attachment; and whereas the said ——— [*plaintiff*] hath not prosecuted his said attachment with effect: Therefore it is considered by the Court that the said plaintiff take nothing by his attachment aforesaid, and that the said garnishee go acquitted thereof without a day, *&c.*

XLIV.

Serjeant's Return of Elongavit.

Thereupon the said serjeant-at-mace returned and certified to the said court that the goods and chattels aforesaid [*or* the goods and chattels, to wit, the said ——— by the jury aforesaid found, *as the case may be*] to places out of the liberties of the said city are eloigned, so that an appraisement thereof could not be made, as to him the said serjeant-at-mace was above commanded.

XLV.

Postea, Verdict, and Judgment upon Elongavit.

And because the said garnishee hath eloigned the said last-mentioned goods and chattels out of the liberties of the said city, so that the same cannot be appraised: Therefore it is commanded by the said Court that an inquiry be made of the value thereof, *&c.*; and it is commanded by the said Court to the said serjeant-at-mace that he summon a jury to inquire and assess the value of the said goods and chattels so eloigned as aforesaid; whereupon the said serjeant-at-mace returned and certified to the said court that he, by virtue of the said precept to him directed, had, according to the custom of the said city, summoned a jury to inquire and assess the value of the said goods and chattels so eloigned as aforesaid; and on the —— day of ———, in the —— year of the reign of her present Majesty Queen Victoria, the jurors aforesaid being solemnly

demanded, twelve of them appeared, who being elected, tried, and sworn according to the custom of the said city to declare the truth of and concerning the premises, and to inquire the value of the said goods and chattels so eloigned as aforesaid, upon their oaths assess the value of the same at —— pounds. Therefore it is considered by the Court that the aforesaid plaintiff have execution of the said sum of —— pounds, being the value of the said goods and chattels so attached [and by the jury found] and eloigned, and by the jury appraised as aforesaid, by pledges, &c., if the defendant, &c., and process for the remainder, &c.

XLVI.

Bill of Proof.

And now comes here into court in his own person ——— of ———(*a*) and claims to be admitted to prove [a certain sum of money, to wit, —— pounds, *or* certain goods and chattels, *describing them*], being in the hands and custody of ——— attached and defended, &c., under and by colour of a certain bill original affirmed against ——— defendant, at the suit of ———, in a plea of debt upon demand [*or as the case may be,*] in the court here, on the —— day of ——— 18—, as in the record of attachment specified to be the [proper monies, *or* goods and chattels] of and belonging to the said approver, and humbly prays to be admitted to make this proof, according to the custom of the city of London.

XLVII.

Præcipe on filing Bill of Proof.

Approver.
Plaintiff.
Garnishee.
Defendant.

Action entered —— day of ——— 18—.
Bill of Proof —— day of ——— 18—.

G. H.
Approver's Attorney,
of ———

(*a*) The Bill of Proof is made in the name of the approver, in person.

XLVIII.

Affidavit of Service of Rule for Probation.

In the Mayor's Court, London.

Between Approver.
Plaintiff.
Garnishee.
Defendant.

I G. H. of, *&c.*, make oath and say that I did on the —— day of ——— 18—, personally serve Mr. ——— the attorney for the abovenamed approver in this cause, with a true copy of the rule hereunto annexed, [*or, if not personally served, say* did on, *&c.* serve Mr. ———, the attorney for, *&c.*, with a true copy of the rule hereunto annexed, by delivering to and leaving the same with a clerk of the said Mr. ——— at his office, situate, *&c. or as the case may be*]. And I further say that no probation or other proceeding has been delivered had or taken by or on behalf of the said approver upon the Bill of Proof herein since the service of the said copy rule as aforesaid.

Sworn, *&c.*

XLIX.

Probation where the Goods of the Approver have been sold to the Garnishees by the Defendant, agent of the Approver, and the price has been attached.

And the said approver ——— by ——— his attorney says, that the said money so attached as aforesaid, and every part thereof, is money due and payable by the said garnishee to him the said approver as and for the price and value of divers goods and chattels heretofore of him the said approver before the said attachment sold and delivered by him the said approver to the said garnishee, by and through means of his agent in that behalf, the said defendant. And the said approver further saith, that the said defendant never had any property or possession whatever of or in the said goods and chattels or any part thereof, other than as such agent thereof, for sale as aforesaid; and that the said money so attached as aforesaid, and every part thereof, was and is the price and value of the goods aforesaid so as aforesaid sold by the said approver

to the said garnishee, and not otherwise; and that no part of the said sum of money so attached as aforesaid ever belonged to, or could or would have passed into the hands or possession of the said defendant, otherwise than as the proper monies of him the said approver. And he prays to be admitted to prove the same, according to the custom of the city of London.

Plea to same.

And the said plaintiff to the probation of the said approver saith, that the money so attached as aforesaid, and every part thereof, is the proper money of the said defendant, and not of the said approver in manner as in the said probation is mentioned; and this the plaintiff prays may be inquired of by the country, *&c.*

And the said approver doth the like. Therefore, *&c.*

Probation where the Goods attached are the property of the Approver, and delivered to Defendant as his Agent for sale.

And the said approver ——— by ——— his attorney saith, that before the time of making the said attachment the said approver was possessed of certain goods and chattels, to wit, [*goods, &c. as attached*], and being so possessed thereof, and before the making of the said attachment, he delivered the same unto the said defendant, and the said defendant received the same as agent of and for the said approver, and for sale for and on account of the said approver; and that the goods and chattels so by the said approver delivered to the said defendant are the same identical goods and chattels in the hands and custody of the said garnishee attached and defended. And the said approver saith, that the said defendant had not at the time of making the said attachment nor at any time since, nor hath he now, any interest in the said goods and chattels or any part thereof, except as such agent as aforesaid; and that the said goods and chattels were at the time of making the said attachment, and from thence have continued to be and now are, the goods and chattels of the said approver, and that the said approver is alone beneficially entitled thereto; and he prays to be admitted to prove the same, according to the custom of the city of London.

Probation where the Goods of the Defendant in the hands of the Garnishee have been sold by the Defendant to the Approver, with Notice thereof to the Garnishee before the Attachment.

And the said approver ——— by ——— his attorney saith, that before the making of the said attachment the said approver bargained for and bought of the said defendant, and the said defendant then sold to the said approver, divers goods and chattels, to wit ——— of and belonging to the said defendant, then being in the hands and custody of the said garnishee, for a large sum of money, to wit, —— pounds, which the said approver then paid to the said defendant; and the approver saith, that notice of such sale was duly given to the said garnishee before the making of the said attachment, and that the said garnishee, from the time of such notice so given to the said garnishee, hitherto has held the same, and now holds the same, for and on account and for the benefit of the said approver; and the said approver saith, that the said goods and chattels so by the said approver bought of the said defendant as aforesaid are the identical goods and chattels in the hands of the said garnishee so attached and defended as aforesaid, and that the said defendant had not at the time of making the said attachment nor at any time since, nor hath he now, any beneficial interest in the said goods and chattels or any part thereof, for that the same at the time of making the said attachment were and still are the proper goods and chattels of the said approver; and he prays to be admitted to prove the same according to the custom of the city of London.

L.

Verdict on Probation for Approver, for whole of the Property attached.

Afterwards, that is to say, on the —— day of ——— in the —— year of the reign of our Sovereign Lady Queen Victoria, the jurors of the jury aforesaid being solemnly called, twelve of them appeared, who being elected, tried, and sworn upon the said jury, according to the custom of the said city, to de-

clare the truth of and concerning the premises, and to try the issue joined between the said parties in the plea aforesaid, for their verdict upon their oaths say; that the said [—— pounds, *or* goods and chattels], so in the garnishee's hands attached as aforesaid, are the [proper monies, *or* goods and chattels] of the said approver, in the manner set forth by his probation herein.

LI.

Judgment thereon.

Therefore it is considered by the Court that the said plaintiff take nothing by his attachment aforesaid, and that the garnishee go acquitted thereof without a day, &c.

LII.

Verdict on Probation for Approver, for part of Property attached.

Afterwards [&c., *as in Form No.* L. *to the words* upon their oath say, *and proceed as follows*]: That [—— pounds, parcel of the monies, *or* ——— (*describing the portion of the goods found by the jury as belonging to the approver*) parcel of the goods and chattels], so in the garnishee's hands attached as aforesaid are the [proper monies, *or* goods and chattels] of the said approver, in the manner set forth by his probation herein. And as to [—— pounds residue of the monies, *or* ——— residue of the goods and chattels] so in the garnishee's hands attached as aforesaid, the jury aforesaid upon their oath aforesaid say that the said [—— pounds *or* ———] are not the [monies, *or* goods and chattels] of the said approver, in the manner set forth by his probation herein.

LIII.

Judgment thereon.

Therefore it is considered by the Court, that so far as relates to the said [—— pounds, parcel of the monies, *or* ———, parcel of the goods and chattels], so in the garnishee's hands attached as aforesaid, the plaintiff take nothing by his attachment aforesaid, and that the garnishee go acquitted thereof without a day, &c.

LIV.

Certiorari to Remove an Attachment (*a*).

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the mayor and aldermen of the city of London greeting: We, being willing for certain causes to be certified, as well of a certain bill original levied in our court before you against ——— at the suit of ——— in a plea of debt upon demand [*or as the plea is*] of —— pounds of lawful money of Great Britain, as of a certain attachment thereupon made of the sum of —— pounds in the hands of ——— [*where more than one attachment have been made upon the same action, for every additional attachment add* and also of a certain other attachment thereupon made of —— pounds in the hands and custody of ——— *concluding with the word* respectively] being attached and defended, command you and every of you that you send to us [*or, in Common Pleas,* to our justices, *or, in Exchequer,* to the barons of our exchequer] at Westminster, immediately after the receipt of this writ, the bill original and attachment [*or* attachments] aforesaid, with all things touching the same, as fully and entirely as they remain in our court before you or any of you, by whatsoever names the parties may be called therein, together with this writ, that we may further cause to be done thereupon what of right we shall see fit to be done.

Witness [*name of Chief Justice or Chief Baron*] at Westminster, the —— day of ——— in the —— year of our reign.

LV.

Suggestion, upon the Record of the Trial, of the Custom of London by the Mayor and Aldermen.

And hereupon it is suggested and manifestly appears that there is and immemorially has been in the city of London a certain custom used and approved of, that when any issue in any court

---

(*a*) This must be returnable immediately, whether in term or out of term. Mayor's Court of London Procedure Act 1857, § 52.

of our Lady the Queen and her predecessors is or has been joined therein as aforesaid upon any custom of the said city used and had, the mayor and aldermen of the said city have from time immemorial certified and informed the said court and the judges thereof, and ought from time to time and still ought so to certify and inform the said court and the judges thereof the said custom, and of and concerning the same by the learned Recorder of the same city verbally, and the plaintiff prays a writ of our Lady the Queen to be directed to the mayor and aldermen of the said city, commanding them to certify to and inform the court of our Lady the Queen, before ———— in manner aforesaid, whether there is and immemorially has been a custom therein as follows, that is to say, that [*here set out the custom as in the pleadings*], and because the defendant does not deny this, therefore the said writ is granted to the plaintiff, returnable before ——— on the —— day of ——— in the year of Our Lord ——. The same day is given to the same parties at the same place.

LVI.

Certiorari to return Custom.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the mayor and aldermen of the city of London greeting: Whereas a certain action on promises [*as the case may be*] hath been lately brought and is now pending in our court of ———— at Westminster before ————, between ———— the plaintiff and ———— the defendant, for [the non-performance of certain promises by the said ———— alleged to have been made by the said ————] in which said action a certain issue hath arisen and is joined between the said parties as we are informed, whether there is and has immemorially been in the said city of London a certain custom therein, that is to say, [*here set out the custom as in the suggestion*], and because it pertaineth to you by the Recorder of the said city, according to the custom of the said city from time immemorial used and approved of therein, to try the truth of the aforesaid issue so joined between the said ———— and ————, and to cer-

tify the aforesaid custom by word of mouth and not otherwise, We command you that you certify and make known in manner aforesaid to our ——— on the —— day of ——— next, whether there is and immemorially has been in the said city of London such custom as in the said issue is stated or not, and have there this writ.

Witness ——— at Westminster the —— day of ——— 18—.

LVII.

Affidavit to found Sequestration.

In the Mayor's Court, London.

I ——— of ——— make oath and say, that ——— is justly and truly indebted to me. [*Here state cause of action. See Forms No.* i.]

And that the said ——— occupied a [house *or* warehouse], situate ———, and that the said [house *or* warehouse] is shut up, and that neither the said ———, nor any person on his behalf is to be found there, and that I believe that the said ——— has abandoned the same.

Sworn, *&c.*

LVIII.

Precept to Serjeant-at-mace to Sequester.

To ———, serjeant-at-mace, or to any other serjeant-at-mace, *&c.*

By the Mayor, *&c.*

We command you that, according to the custom of the city of London, you do sequester a certain [warehouse], situate and being [on the ground floor of the house], No. —, in the city of London, and the goods and chattels therein contained, as the proper warehouse of ——— to answer ——— in a plea of debt upon demand of —— pounds of lawful money of Great Britain. Dated this —— day of ——— 18—.

Sworn £

G. H. [Registrar.]

Plaintiff's Attorney,

of ———

LIX.

Precept to Serjeant-at-mace to open Warehouse and Appraise Goods.

To ————, serjeant-at-mace, &c., or to any other serjeant-at-mace.

By the Mayor, &c.

We command you that, according to the custom, &c., you cause to be opened in your presence a certain [warehouse], situate and being [on the ground floor of the house], No. —, in the city of London, and cause the goods and chattels therein contained to be appraised by two freemen of the city of London in your presence, as the proper goods and chattels of ———— [*defendant*], and which said [warehouse], goods and chattels were lately sequestered by you, according to the custom, &c., at the suit of ———— [*plaintiff*], so that you have the said appraisement here in court without delay. Dated at the Guildhall, London, this —— day of ——— 18—.

G. H.

Plaintiff's Attorney, [Registrar.]
of ———

LX.

Inventory and Appraisement of Goods sequestered.

An inventory and appraisement taken this —— day of ——— 18—, by ———— of ————, and ———— of ————, of certain goods and chattels in a [warehouse], situate [on the ground floor of the house], No. —, in the city of London, and which said [warehouse], goods and chattels were lately sequestered by certain proceedings in the Mayor's Court, London, by ———— [*plaintiff*], as the proper [warehouse], goods and chattels of ———— [*defendant*], and which said goods and chattels are of the quantities and descriptions following; that is to say ———, and are valued by us at the sum of —— pounds.

Sworn by the said ——— and ———,
at ———

LXI.

Record Judgment and Execution in Sequestration.

[*Here enter the Action as in the Record of an Attachment.*]

And the said plaintiff by his said attorney prays process, according to the custom, &c., and it is granted, &c., and thereupon it is commanded by the Court to ————, one of the serjeants-at-mace of the said court, that he, according to the custom of the said city, summon by good summoners the said defendant to appear here in this court to answer the said plaintiff in the plea aforesaid, and that he return and certify what, &c.; and afterwards, to wit, at the same court, the said serjeant-at-mace returned and certified to the said court, according to the custom, &c., that the said defendant was not to be found within the said city; and at the same court the said defendant was solemnly called and did not appear, but made default. And now at this same court it is alleged by the said plaintiff, by his said attorney, that the said defendant has become fugitive, and hath left in his [warehouse], situate [on the ground floor of a certain messuage, house, and premises, being] ————, in the parish of, &c., in the ward of, &c., in the city of London, and within the jurisdiction of this court, divers goods and chattels, the property of the said defendant, locked up in the said [warehouse]; and therefore the said plaintiff by his said attorney prays process, according to the custom, &c., to sequester the said [warehouse], goods and chattels of the said defendant, so that the said defendant may appear in this court here to be holden, &c., to answer the said plaintiff in the plea aforesaid. Whereupon it is commanded by the Court to the said serjeant-at-mace, that he, according to the custom, &c., sequester the said [warehouse], situate, &c., and the said goods and chattels therein contained, so that the said defendant may appear in this court here to be holden, &c., to answer the said plaintiff in the plea aforesaid, and that the said serjeant-at-mace return, &c.; and afterwards, to wit, at a court holden, &c., on (*a*) ——— aforesaid, the said plaintiff, by his said attorney appears, and the said serjeant-at-mace re-

---

(*a*) Same as in an Attachment. See *Record in an Attachment*.

turned and certified to the same court that he, by virtue of the said precept, on the (*a*) —— day of ———, between the hours of —— and —— in the —— noon, according to the custom, &c., made a sequestration of the said [warehouse] of the said defendant situate as aforesaid, and the divers goods and chattels in the said warehouse contained, as the proper warehouse, goods and chattels of the said defendant, so that the said defendant might appear at this court to answer the said plaintiff in the plea aforesaid; and thereupon the said defendant at the same court was solemnly called and did not appear, but made a first default, which said first default at the same court is recorded, according to the custom, &c., and a further day is given by the court to the said defendant to appear at the next court to be holden, &c., on (*a*) ——— the —— day of ———, at which said next court holden, &c., the plaintiff, by his said attorney, appears and offers himself against the said defendant in the plea aforesaid; and thereupon at the same court the said defendant was again solemnly called and did not appear, but made a second default, which said second default is recorded, &c.; and thereupon a further day is given by the court to the said defendant to appear at the next court to be holden, &c., on (*a*) ——— the —— day of ——— aforesaid, at which said next court holden, &c., the said plaintiff, by his said attorney, appears and offers himself against the said defendant in the plea aforesaid, and the said defendant was again solemnly called and did not appear, but made a third default, which said third default is recorded, &c.; and thereupon a further day is given by the court to the said defendant to appear at the next court to be holden, &c., on (*a*) ——— the —— day of ———, at which said next court holden, &c., the said plaintiff, by his said attorney, appears and offers himself against the said defendant in the plea aforesaid; and thereupon the said defendant was again solemnly called and did not appear, but made a fourth default, which said fourth default is recorded, &c.; and thereupon, after the said four defaults recorded by the court against the said defendant in the plea aforesaid, according to the custom, &c., the said plaintiff, by his said attorney, prays process, according to the custom, &c.; and that the said ser-

---

(*a*) Same as in an Attachment. See *Record in an Attachment.*

jeant-at-mace do, according to the custom of the city, open the said warehouse, and cause to be appraised the said goods and chattels of the said defendant so being in the said warehouse. Whereupon it is by the same court commanded to the said serjeant-at-mace that he cause the said warehouse to be opened in his presence, and the goods and chattels therein contained to be appraised in the presence of him the said serjeant-at-mace, according to the custom of the said city, so that he have an appraisement thereof here in court on the —— day of ———; on which day the said serjeant-at-mace returned and certified to the said court that he, by virtue of the said precept to him directed, had caused the said warehouse to be opened in his presence, and [*where a portion of the goods is sufficient, say* certain of] the goods and chattels therein contained, that is to say, ——— to be appraised on the oaths of ——— and ——— to the value of —— pounds, which said appraisement the said serjeant-at-mace has ready here in court, as to him above was commanded; and thereupon the said plaintiff prays execution of the said goods and chattels so appraised as aforesaid to be awarded to him, *&c.*: Therefore it is considered by the court that the aforesaid plaintiff have execution of the said goods and chattels, to wit, the said ——— so appraised as aforesaid, by pledges, *&c.*, if the defendant, *&c.*, and process for the remainder, *&c.* And the said plaintiff here in court, in his own proper person, found sufficient pledges to restore, *&c.*, if the defendant, *&c.*, that is to say, ——— and ———, and thereupon a precept for that purpose being delivered to the said serjeant-at-mace, the said plaintiff had execution of the said goods and chattels, to wit, the said ——— so appraised as aforesaid at the said sum of —— pounds, and thereof hath acknowledged himself satisfied.

Writ of Execution upon Sequestration.

To ———, serjeant-at-mace, *&c.*, or to any other serjeant-at-mace.

By the Mayor, *&c.*

We command you that you cause to be delivered to ——— [*plaintiff*] certain goods and chattels, to wit, ——— ap-

praised at the sum of —— pounds, lately sequestered by the said ———— in a certain [warehouse], situate, *&c.*, as the proper goods and chattels of ———— [*defendant*], and by due process of sequestration and judgment recovered against him the said ————, and have you the said goods and chattels here in court without delay, to satisfy the said ———— according to the tenor and effect of the said judgment thereof given; and this you are not to omit on the peril incumbent, and have you there this precept. Dated in the Chamber of the Guildhall of the city of London, this —— day of ———.

[Registrar.]

LXII.

Procedendo.

VICTORIA, [*&c., as in* Certiorari, *Form* No. liv., ante]: Although we, being willing for certain causes to be certified as well of a certain bill original in our court before you or some of you levied or affirmed against ———— at the suit of ————, in a plea of debt upon demand of —— pounds of lawful money of Great Britain, as of a certain attachment thereupon made of —— pounds in the hands and custody of ———— [*if more than one attachment has been made on the same action, for every additional attachment add* and also of a certain other attachment thereupon made of —— pounds in the hands and custody of ————] being attached and defended, lately by our writ commanded you and every of you that you should send to us [*or, in Common Pleas,* to our justices; *or, in Exchequer,* to the barons of our exchequer] at Westminster, immediately after the receipt of our said writ, the bill original and attachment [*or* attachments] aforesaid, with all things touching the same, as fully and entirely as they remained in our court before you or any of you, by whatsoever names the parties might be called therein, together with that writ, that we might further cause to be done thereupon what of right we should see fit to be done; yet We, being now moved by certain causes in our court before us [*or, in Exchequer,* before the barons of our said exchequer; *or, in Common Pleas,* yet for certain causes in this behalf specially moving our justices

aforesaid, we] command you and every of you, that as well in the bill original aforesaid in our said court before you or some of you levied or affirmed against the said ————, at the suit of the said ———— in the plea aforesaid, as in the attachment [*or* attachments] aforesaid [respectively] thereupon made of the said —— pounds in the hands and custody of the said ———— [and ————], you proceed with what speed you can, in such manner according to the law and custom of England as you shall see proper, our writ of *Certiorari* aforesaid to you thereupon before directed to the contrary thereof in anywise notwithstanding.

Witness [*name of Chief Justice or Chief Baron*], at Westminster, the —— day of ——— in the —— year of our reign.

LXIII.

Record in Attachment.

In the Mayor's Court, London.

[*Here engross the Plaint or Declaration.*
See Form of the count Sur concessit solvere, No. v., ante, p. 159; *see also*, ante, p. 76.]

And the said plaintiff by his said attorney prays process, according to the custom, *&c.*, and it is granted, *&c.*, and thereupon it is commanded by the Court to ————, one of the serjeants-at-mace of the said court, that he, according to the custom of the said city, summon by good summoners the said defendant to appear here in this court to answer the said plaintiff in the plea aforesaid, and that he return and certify what, *&c.*; and afterwards, to wit, at the same court, the said serjeant-at-mace returned and certified to the said court, according to the custom, *&c.*, that the said defendant had nothing within the said city or the liberties thereof whereby he can be summoned, nor was he to be found within the same; and at the same court the said defendant was solemnly called and did not appear but made default. And now at this same court it is alleged by the said plaintiff, by his said attorney, that A. B. owes to the said defendant the sum of —— pounds in monies numbered as the proper monies of the said defendant, and now

has and detains the same in his hands and custody (*a*);
[*or*, that A. B. has and detains in his hands and custody divers goods and effects, that is to say, four bales of wool marked respectively A, B, C, and D (*or as the case may be*), as the proper goods and effects of the said defendant (*a*);
or, * that A. B. owes to the said defendant divers sums of money, and that he has in his hands and custody other monies, goods, and effects of and belonging to the said defendant, and that divers other monies, goods, and effects will hereafter become due from or come into the hands and custody of the said A. B. for and on account of the said defendant *] (*a*);

(*a*) It appears that under this averment upon the record, taken in conjunction with the prayer of the plaintiff for process *according to the custom*, and the plea of the garnishee, that not only the property in the garnishee's hands at the time of the service of the attachment, but also property coming to the garnishee's hands after the attachment to the time of the plea, has been considered included and liable to be taken under the attachment.

It seems doubtful, however, supposing the custom affects all property coming into the garnishee's hands at any time between the service of the attachment and the plea, whether this form of record is sufficient to include the property so coming into the garnishee's hands after the service of the attachment, for the record states that the plaintiff charges the garnishee with having in his possession certain specific property, describing it, and the court thereupon grants the attachment, and the defendant is attached by the said property *so being in the hands and custody of the said garnishee as aforesaid*; and all the subsequent statements upon the record relating to the possession of the property are made as *so being, or so attached, in his hands and custody as aforesaid*, and although the plea denies that any property has come into possession of the garnishee *since the attachment made*, yet concludes with the words *in manner and form as the said plaintiff by his attachment has above supposed.*

It appears, however, that the proceedings which are professed to be registered by the record are not registered correctly, for whatever the plaintiff may be supposed to state to the court as to the possession of the property by the garnishee, the court does not, by the attachment paper or warning to the garnishee, attach any specific property by description, as would appear from the statements upon the record, for it attaches *all such monies, goods, and effects, as you now have or which hereafter shall come into your hands and custody, of the said defendant.* It is not until the *Scire facias* issues that any specific property is described: in that proceeding the property is described, and the garnishee is summoned to show cause why the plaintiff should not have execution thereof.

The form of record as now used appears to be sufficient for the purposes of attaching property in the garnishee's hands at the time of the service, and if altered and made consonant to the proceedings themselves, it would be sufficient to include all property coming into the garnishee's hands from the time of the attachment until the date [*testè*] of the *Scire facias*; for this purpose the addition of the words between the asterisks would be sufficient.

and therefore the said plaintiff by his said attorney prays process according to the custom, &c., to attach the said defendant by the said monies, goods, and effects so being in the hands and custody of the said ————, *or coming thereto* as aforesaid, so that the said defendant may appear in this court here to be holden, &c., to answer the said plaintiff in the plea aforesaid. Whereupon it is commanded by the court to the said serjeant-at-mace, that he, according to the custom, &c., attach the said defendant by the said monies, goods, and effects so being in the hands and custody of the said ————, *or coming thereto* as aforesaid, and the same in his hands and custody defend and keep, so that the said defendant may appear in this court here to be holden, &c., to answer the said plaintiff in the plea aforesaid, and that the said serjeant-at-mace return, &c. And afterwards, to wit, at a court holden, &c., on (*a*) ———— aforesaid, the said plaintiff by his said attorney appears, and the said serjeant-at-mace returned and certified to the same court that he, by virtue of the said precept, on the (*b*) —— day of ——— between the hours of (*c*) — and — in the —noon, had attached the said defendant by the said monies, goods, and effects so being in the hands and custody of the said ————, *or coming thereto*, and the same defended, &c., according to the custom, &c., so that the said defendant might appear at this court to answer the said plaintiff in the plea aforesaid; and thereupon the said defendant at the same court was solemnly called and did not appear, but made a first default, which said first default at the same court is recorded, according to the custom, &c., and a further day is given by the court to the said defendant to appear at the next court to be holden, &c., on (*d*) ———— the —— day of ———, at which said next court holden, &c., the plaintiff by his said attorney appears and offers himself against the said defendant in the plea aforesaid; and thereupon at the same court the said defendant was again solemnly called and did not appear, but made a second de-

---

(*a*) The day following that upon which the attachment was served.

(*b*) The day of the service of the attachment.

(*c*) The time of the service of the attachment must be obtained from the serjeant-at-mace. See *ante*, p. 82, note [s].

(*d*) The second day following that upon which the attachment was served.

fault is recorded, &c.; and thereupon a further day is given by the court to the said defendant to appear at the next court to be holden, &c., on (*a*) ——— the —— day of ——— aforesaid, at which said next court holden, &c., the said plaintiff by his said attorney appears and offers himself against the said defendant in the plea aforesaid, and the said defendant was again solemnly called and did not appear, but made a third default, which said third default is recorded, &c.; and thereupon a further day is given by the court to the said defendant to appear at the next court to be holden, &c., on (*b*) ——— the —— day of ———, at which said next court holden, &c., the said plaintiff by his said attorney appears and offers himself against the said defendant in the plea aforesaid; and thereupon the said defendant was again solemnly called and did not appear, but made a fourth default, which said fourth default is recorded, &c.; and thereupon, after the said four defaults recorded by the court against the said defendant in the plea aforesaid, according to the custom, &c., the said plaintiff by his said attorney prays process, according to the custom, &c., to warn the said garnishee to be and appear in this court to show cause, &c.; whereupon at the same court holden, &c. (*c*), it is commanded by the same court to the said serjeant-at-mace, that he, according to the custom of the city, warn and make known to the said garnishee to be and appear here in this court, to be holden, &c., on (*d*) ——— the —— day of ———, to show cause, &c., why the said plaintiff ought not to have [execution of —— pounds, *or, where the attachment is for goods, &c., and they have been particularized in the record,* judgment of appraisement of the said goods and effects; *or, in case they have not been so particularized,* judgment of appraisement of four bags of wool, marked respectively A, B, C, and D (*or as the case may be*)], so attached in his hands and custody as aforesaid (*e*); and that the said serjeant-at-

---

(*a*) The third day following that upon which the attachment was served.

(*b*) The fourth day following that upon which the attachment was served.

(*c*) *Quære*: Whether this must be at the same court on which the defendant made his fourth default. See *ante*, p. 83, note [u], and Certificate, *Sterkey* Recorder, Appendix.

(*d*) The return day of the *Scire facias*. See *ante*, pp. 75, 84.

(*e*) If the custom is intended to be pursued, so as to seek to recover property coming into the garnishee's hands after the *teste* of the *Scire facias*, it

mace return and certify at the same court what, &c. The same day is given by the court to the said plaintiff to be there, &c. At which said court holden, &c., the said plaintiff by his said attorney appears, and the said serjeant-at-mace hath returned and certified to the same court that he, by virtue of the said precept to him directed, and according to the custom, &c., hath warned and made known to the said garnishee to be and appear at this same court, to show cause, &c., as above commanded; and thereupon at the same court the said garnishee is solemnly called and appears, and appoints in his stead ———— his attorney, and hath leave to imparle until, &c.; [*or*, and doth not appear, but makes default]. Therefore, &c., *ante*, p. 122.

LXIV.

Power of Attorney to acknowledge satisfaction on Record of Attachment.

To ———— and ————, jointly and severally attorneys of the Lord Mayor's Court, London, or to any other attorney of the said court.

These are to authorize and empower you the said ———— and ————, or either of you, or any other attorney of the court aforesaid, for me and in my name to enter up and acknowledge satisfaction upon the record of a certain judgment obtained by me ————, in the said Lord Mayor's Court, London, on the —— day of ———— 18—, for the sum of —— pounds [*or, in case of goods*, for four bales of wool, marked respectively A, B, C, D; *or, in case of packages or boxes locked*, for two packages or boxes, marked respectively Y and Z, and

---

is presumed the following or similar words should be added:—"Also exe-"cution of all such monies, goods, and effects as shall hereafter come into "your hands and custody on account of the said defendant."

If the garnishee appear and plead, the verdict of the jury may determine the amount of the money or goods in the garnishee's possession; but if the garnishee do not appear, it seems difficult to know for what the plaintiff can sign judgment.

The garnishee may appear, as *ante*, p. 100, note [b], and confess to the possession of certain property.

the goods and chattels, namely (100 yards of lace), therein contained, appraised and valued at the sum of —— pounds (*and if the garnishee have a lien, say* subject to the garnishee's lien of —— pounds), which said goods and chattels have been] heretofore attached by me in the said court, in the hands of ———— garnishee, as the proper monies [*or* goods and chattels] of ———— defendant, upon and by virtue of a certain action of debt, entered by me in the said court against the said ———— on the —— day of ———— 18—, and by due process of law recovered by me against the said ————, according to the custom of the city of London; and for your or any or either of your so doing this shall be your sufficient warrant and authority. As witness my hand and seal this —— day of ———— 18—.

Signed, sealed, and delivered in the
presence of ————, *&c.* (*a*)

LXV.

Plea of Attachment.

[See *Crosby* v. *Hetherington*, *Westoby* v. *Day*, *Webb* v. *Hurrell*, *ante*; and the Books of Entries by Brownlow, Coke, Levinz, Rastell, and Vidian, and the *Liber Intrationum*.]

The defendant, by ———— his attorney, says that the city of London now is and immemorially has been an ancient city, and that there is and immemorially has been a custom therein that if any plaint of debt shall be levied or affirmed by any person in the court of the lord the King before the mayor and aldermen for the time being in the Chamber of the Guildhall of the same city, so that by virtue of such plaint the same court shall command any serjeant-at-mace of the same mayor within the same city and the minister of such court to summon the party defendant in the same plaint specified to appear at the court of the lord the King in the Chamber of the Guildhall of the same city, holden before the mayor and aldermen of such city, to answer the plaintiff in the same plaint named in the plea in such plaint specified, and such serjeant-

(*a*) The signature of the witness must be verified.

at-mace and minister at such court whereat such plaint shall be levied or affirmed shall by virtue of such precept testify by word of mouth to the same mayor and aldermen that the defendant in the same plaint named had nothing within the liberty of the city aforesaid whereby he might be summoned, and then the same defendant at the same court shall make default, and thereupon in such court the plaintiff named in such plaint shall testify and allege by word of mouth to the same mayor and aldermen that some other person for any cause whatsover is indebted to such defendant in any sum of money amounting to the debt in the plaint aforesaid specified or part thereof, then on the petition of the plaintiff in the same plaint named the same court shall command such serjeant-at-mace and minister that the same serjeant shall attach the defendant in such plaint named by such sum being in the hands or custody of such other person found within the jurisdiction of the said court, and then if such serjeant-at-mace and minister of the court return and certify to such court such defendant to be attached, according to the said custom, by such sum of money so being in the hands or custody of such other person to be defended and kept, so that such defendant in such plaint named may or might appear at the same or the then next court holden or to be holden to answer such plaintiff in the plea in such plaint specified, and if the defendant at that and three other courts then next severally holden or to be holden before the mayor and aldermen of the said city in the Chamber of the Guildhall of the said city being solemnly called does not appear but makes default, and such four defaults, according to the custom of the said city, are recorded against such defendant at such four courts after such attachment made, and if such plaintiff in such plaint named at every of such four courts, in his own person or by his attorney, appear according to the custom of the said city, then at the last of the said four courts or at any court holden or to be holden after such four defaults recorded, at the petition of such plaintiff in such plaint named made to the court, it is and has been used for the court to command such or any other serjeant-at-mace and minister of the court to warn such other person so being found within the said city, according to the custom of the said city, to be and appear at any court afterwards to be

holden before the mayor and aldermen of the said city to show if any thing he has or knows to say for himself why such plaintiff in such plaint ought not to have execution of such sum so attached as aforesaid; and if at such court such serjeant-at-mace return and certify such other person in whose hands such sum of money is or has been attached to be warned according to such custom to be and appear in the same court to show such cause, and if such person so warned being solemnly called at such court do not appear or has not appeared but makes or has made default, then it is and from time immemorial it has been used and accustomed for such court to award such plaintiff to have execution of such sum so attached to satisfy such plaintiff the debt in such plaint specified, or so much thereof as such sum so attached extends or has extended to satisfy, by sufficient pledges to be found and given by such plaintiff in such plaint named in the said court, according to such custom, to restore to such defendant such sum of money so attached, if such defendant within a year and a day thence next ensuing come or has come into the court so holden, and disproves or avoids or has disproved or avoided such debt in such plaint mentioned according to the custom of the said city, and that after such pledges found and execution had of such sum so in the hands and custody of such other person attached and defended by the plaintiff in such plaint named, such other person in whose hands or custody such sum is or has been attached is or has been discharged against such defendant of the sum so attached and had in execution, and such defendant in such plaint named is or has been discharged against the said plaintiff of so much of his debt in such plaint demanded by such plaintiff, so long as such judgment and execution remains in force and effect not revoked or disproved by such defendant, and if such sum of money so attached and defended and had in execution amount not nor has amounted to the whole sum of the debt in and by the said plaint demanded by such plaintiff against such defendant, then such plaintiff by the custom of the said court is and from time immemorial has been used and accustomed to have process against such defendant, according to such custom, for the residue of his debt by him in such plaint demanded; that the said custom and all other customs of the said

city obtained and used in the said city during all the time aforesaid were by authority of a Parliament holden in the seventh year of the reign of His Majesty Richard the Second late King of England, and by divers other statutes, ratified and confirmed to the then mayor and commonalty of the said city and their successors: and the defendant says that ————, before the commencement of this action, to wit, on the —— day of —— A. D. 18—, in his own proper person came into the court of our Sovereign Lady the Queen holden before the mayor and aldermen of the said city of London in the Chamber of the Guildhall of and within the said city, according to such custom, and then and there affirmed a certain plaint against the now plaintiff in a plea of debt upon demand of —— pounds of lawful money of Great Britain, and then attached the said sum in the hands of the now defendant as garnishee, according to the said custom, and such proceedings were thereupon had (*a*) by the said ———— in the same court according to such custom; that afterwards, and before this suit and in all respects pursuant to such custom, to wit, on the —— day of ———, A. D. 18—, it was considered by the same court that the said ———— should have execution of the said sum of —— pounds so attached in the hands of the now defendant, according to the said custom, which judgment is still in force; and thereupon and before the commencement of this suit, [*or* after the commencement of this suit and before the day plaintiff declared herein] the said ———— then and there, according to the said custom of the said court, had execution of the said sum of —— pounds against the now defendant the said garnishee, under which execution the defendant was afterwards, and before the commencement of this suit [or plaintiff declared herein,] forced to pay, and did within the said city, and according to the said custom, pay to the said ———— the said sum of —— pounds, as by the record and proceedings thereof remaining in the said Chamber of the Guildhall in the city of London aforesaid more fully appears: and the defendant says that the said sum of —— pounds so attached and taken in execution by the said ———— was and is the

---

(*a*) If it is still considered necessary to insert in the plea the proceedings in the Mayor's Court in detail, see *post*, p. 204.

said sum of —— pounds in the introductory part of this plea mentioned [*verification*] (*a*).

[*If it is still considered necessary to insert in the plea the proceedings in the Mayor's Court in detail, after the words* "lawful money of Great Britain," p. 203, *continue as follows*:]

and then and there appointed in his stead ———— his attorney, against the now plaintiff in the plea of the said plaint, according to such custom, and it was granted to him, &c.; whereupon, at the petition of the said ————, then and there made to such court by his said attorney, and by virtue of such plaint, it was then and there commanded by the said court to ————, then being one of the serjeants-at-mace of the said mayor and a minister of such court, that he, according to such custom, should summons the now plaintiff to appear at the same court so holden before the mayor and aldermen of the said city to answer the said ———— in the plea in such plaint specified, and that the said serjeant-at-mace should return and certify what he should do by virtue of the said precept; that afterwards at the same court the said serjeant-at-mace, according to such custom, returned and certified to the same court that the plaintiff in this suit had nothing within the said city or the liberties thereof whereby he could be summoned, nor was he to be found within the same, and thereupon the now plaintiff was then and there at the same court solemnly called and did not appear but made default; that thereupon afterwards, and before the commencement of this action, to wit, on the —— day of ———— last mentioned, at the same court, it was alleged by the said ————, by his said attorney, that the now defendant owed to the now plaintiff —— pounds in monies numbered as the proper monies of the now plaintiff, and then had and detained the same in his hands and custody; that thereupon the said ———— by his said attorney then and there prayed process, according to such custom, to attach the said ———— by the said —— pounds so being in the hands and custody of the now defendant, so that the

---

(*a*) The plea ought to conclude with an averment *et hoc paratus, &c.*; R. Jones, 406. The plea must show that the money attached was parcel of the debt demanded. *Humphrey* v. *Barnes*, Cro. Eliz. 691; Com. Dig. Attachment I.

now plaintiff might appear at the next such court to be held before the mayor and aldermen of the said city in the Chamber of the Guildhall of and in the said city, to answer the said ——— in the plea in such plaint specified; whereupon, at his said petition, it was then and there commanded by such court, before the commencement of this action, to the said serjeant-at-mace and minister of the said court, that he, according to such custom, should attach the now plaintiff by the said —— pounds so being in the hands and custody of the now defendant as aforesaid, and the same in his hands and custody defend and keep according to such custom, so that the now plaintiff might appear at the then next such court to be holden before the said mayor and aldermen of the said city in the Guildhall of the said city, according to such custom, to answer the said ——— in the plea in the said plaint specified, and that the said serjeant-at-mace and minister of the said court should then return and certify to such court what he should do by virtue of that precept; and the same day was given to the said ———; that afterwards and before the commencement of this suit, to wit, on the —— day of ———, he the now defendant, being then found within the said city and within the jurisdiction of the said court, was then and there duly warned, according to the said custom, by the said serjeant-at-mace and minister of the said court, not to part with the said sum of —— pounds without the license of the said court, but the same in his hands and custody safely to keep, so that the now plaintiff might be attached thereby, that he might appear at the said then next court to answer the said ——— in the plea in the said plaint specified; that thereupon the said serjeant-at-mace duly attached the now plaintiff by the said sum of —— pounds; that afterwards, to wit, at the said then next court holden before the said mayor and aldermen of the said city in the said Chamber of the Guildhall of the said city, to wit, on the —— day of ——— last aforesaid, the said serjeant-at-mace returned and certified to the same court that he, by virtue of the said precept, had theretofore, to wit, on the —— of ———, in the year last aforesaid, between the hours of —— and —— of the clock in the ——, attached the now plaintiff by the said —— pounds, so being in the hands and

custody of the now defendant, and the same had defended and kept in his hands and custody, according to such custom, so that the now plaintiff might appear at the said court so holden on the said —— day of ——— in the year aforesaid, to answer the said ——— in the said plea in his said plaint specified; that thereupon the now plaintiff, at the same court, was solemnly called but did not appear, but then made a first default, which said first default at the same court was recorded according to such custom; that thereupon, according to such custom, a further day was then given by the same court to the now plaintiff, to appear at the then next such court to be holden before the mayor and aldermen of the said city in the Chamber of the Guildhall of the said city, on the —— day of ——— in the year aforesaid; that thereupon the now plaintiff was solemnly called but did not appear, but then made a second default, which said second default at the same court was recorded according to such custom; that thereupon, according to such custom, a further day was then given by the same court to the now plaintiff, to appear at the next such court to be holden before the lord mayor and aldermen as aforesaid; that thereupon the now plaintiff was solemnly called but did not appear, but then made a third default, which said third default was recorded according to such custom; and thereupon, according to such custom, a further day was then given by the same court to the now plaintiff, to appear as aforesaid; that thereupon the now plaintiff was solemnly called but did not appear, but then made a fourth default, which said fourth default was recorded according to such custom; that thereupon afterwards, and after the said four defaults had been recorded as aforesaid by the same court against the now plaintiff in the plea aforesaid, according to such custom, the said ——— having appeared at every of such courts so held as aforesaid, the said ——— by his said attorney then at the same court prayed process, according to such custom, to warn the now defendant, the garnishee, to be and appear in the same court to be holden on ——— the —— of ——— then instant, to show cause why the said ——— should not have execution of the said —— pounds so attached in his said hands and custody; that thereupon at such court so holden as aforesaid, at the said petition of the said ———

made in such court, it was commanded by the said court to the said serjeant-at-mace, that he, according to such custom, should warn and make known to the now defendant, being the garnishee, to be and appear in such court to be so as aforesaid holden on ——— the —— day of ——— then instant, to show cause why the said ——— should not have execution of the said —— pounds so attached in his hands and custody, and that the said serjeant-at-mace should then return and certify to the same court what he should have done by virtue of such precept, and the same day was given by the same court to the said ———, to be there according to such custom; that afterwards he the now defendant was within the said city duly warned by the said serjeant-at-mace to be and appear at such court to be so as aforesaid holden on the said —— day of ———, to show cause why the said ——— should not have execution of the said sum of —— pounds; that at the said court holden on the said —— day of ——— in the year last aforesaid, the said ——— by his said attorney appeared, and the said serjeant-at-mace then returned and certified to the same court that he, by virtue of such precept to him directed, and according to such custom, had warned and made known to the now defendant, the garnishee, to be and appear at the same court to show such cause; and thereupon, at the same court, the now defendant, the garnishee in such attachment, was solemnly called according to such custom and appeared not: Whereupon it was considered by the same court [*conclude as at page* 203, *from the words* "it was considered by the same court," *to the verification.*

LXVI.

Continuation of Record after Appearance of Defendant in Dissolution of Attachment.

[*After the last proceeding in the Attachment, proceed as follows*:]

And afterwards, and before execution had in the said attachment, to wit, on the —— day of ———, the said defendant appeared to answer the said plaintiff in the plea aforesaid [and was delivered to bail to ——— and ———; *or, in case of*

common bail being filed under order, say, and, by virtue of an order of the said court of mayor and aldermen of the said city, was delivered to bail to *John Doe* and *Richard Roe*; ***or in case of render say,*** and voluntarily surrendered his body to the custody of the said serjeant-at-mace] in dissolution of the said attachment, and appointed in his stead ———— his attorney, and hath leave to imparle until, *&c.*

APPENDIX.

No. 1.

The Custom of Foreign Attachment as stated in *Liber Albus* (*a*).

[*Translation.*]

Item: When a plaint of debt is brought before any of the said sheriffs, and testimony is given by the minister that the defendant hath not sufficient within the city, and it is alleged by the plaintiff that the defendant hath goods and chattels or debts in other hands or in other keeping within the said city, and the plaintiff prayeth that such goods and chattels may be arrested, and an extent may be made of the debts, then at the suit and suggestion of such plaintiff such goods and chattels shall be arrested wheresoever they be found within the city, and an extent shall be made of the debts in the hands of the debtors at the peril of the plaintiff; and this done the plaintiff shall pursue at four courts before the same sheriff before whom the plaint was affirmed until the defendant be four times demanded; and if the defendant come not at the fourth court and hath made four defaults, then shall the goods and chattels arrested be appraised and delivered to the plaintiff, and if the goods amount not to the value of the debt, then the debts extended in the hands of the debtors shall be levied and delivered to the same plaintiff up to the amount in demand. And such arrests of goods and extents of monies are called "foreyns attachiementz," according to the custom of the city; and thereupon the plaintiff shall find sufficient surety to the court by pledges before that the delivery thereof be made, upon this condition, to make restitution to the defendant of all the goods and chattels so taken or of the value of the same, and of such money whereof he hath had execution, if

---

(*a*) *Liber Albus* was compiled, according to the *Proœmium*, in the year 1419 by John Carpenter, then Town Clerk. It is a compilation of the laws, customs, and usages of the citizens. See *Munimenta Gildhallæ Londoniensis*, vol. i.

so be that the defendant come within the year and the day next ensuing into the court, and can discharge himself and justify by law that he owed nothing to the plaintiff at the time of such plaint made; and if the same defendant will come within the year and the day as is aforesaid to justify himself and plead with the plaintiff, then he shall have a *Scire facias* out of the same record against the party that hath had such execution, to warn him to come to the next court if he knows any thing to say why restitution should not be made in manner aforesaid; and if he against whom the *Scire facias* is sued be warned and make default, or if that it be testified that he hath nothing in the city by which he could be warned and come not at the next court, then he that made the *Scire facias* shall have restitution of all such goods and chattels so taken, or of the value thereof, and of all the monies which the party hath received by the foreign attachment. In the same manner he shall have restitution if he can discharge himself by way of plea; and in the same manner restitution shall be made according to the rate of proportion if the defendant can discharge himself by way of plea of parcel of the debt, although he cannot discharge himself of the whole; and if the party that hath had such execution hath not sufficient to make restitution in the manner aforesaid, then his pledges shall be charged; and if he against whom such foreign attachment is made come not within the year and the day to justify himself as is aforesaid, then he shall be barred for ever after. And it is to wit, that pending such foreign attachment, if any other person will come in Court of Record before the fourth default be recorded or before execution be sued, and be ready to prove that the goods arrested were his proper goods at the time of the arrest made, and yet are, and not his for whose goods they were arrested, and that that party for whose goods they were arrested hath no property in the same goods nor any other whatsoever but himself alone, to the value of a groat, then he shall be put to the proof and shall swear in manner aforesaid by himself, and shall have delivered unto him all such goods so arrested or parcel thereof, according as he hath made the proof thereof.

Likewise a servant shall make proof of his master's goods being in his custody according to the discretion of the court; and also if the defendant in such foreign attachment come into court at the fourth default recorded, or before he shall be received to plead with the plaintiff, and in the same manner shall be received if he come

before execution sued, so that the plaintiff be present in court or otherwise warned; and in the same manner in such foreign attachments those in whose hands any goods be arrested by suggestion of the plaintiff, and those in whose hands any money be extended, may come in Court of Record before the same sheriffs and be excused and discharged by their oath that they have no such goods in their custody, and that they owed not a penny to such defendants at the time that the arrests and extents were so made in their hands.

No. 2.

Writ and Certificate of *STERKEY*, Recorder.

[*Translated from Liber* L, 175[b] (*a*).]

1482. *Hariot*, Mayor; *Humphrey Sterkey*, Recorder; 22 *Edw.* IV., L, 175[b].

The Custom upon Foreign Attachment recited by Writ.

EDWARD, by the grace of God, *&c.* To the mayor and aldermen of the city of London, greeting: Whereas by a plea moved in our court before our justices at Westminster, between Roger Bourghchier, citizen and mercer of London, plaintiff, and John Colyns late of London, mercer, otherwise called John Colyns, mercer, citizen of London, defendant, to the end that the same John should render to the aforesaid Roger one hundred pounds which he owes to him and unjustly detains, as it is said, for a long time agitated in the same our court, it is come to this issue between the parties aforesaid: Whether in the city aforesaid such is and from time immemorial hath been the custom, to wit, * That if any plaint of debt shall be levied or affirmed by any person in the court of the

---

(*a*) The Lettered Books are books in the possession of the Town Clerk, and contain matters of and relating to the corporation and its proceedings.

lord the King before the mayor and aldermen for the time being, in the Chamber of the Guildhall of the same city, so that by virtue of such plaint the same court shall command any serjeant-at-mace of the same mayor within the same city, and the minister of such court, to summon the party defendant in the same plaint specified to appear at the next court of the lord the King, in the Chamber of the Guildhall of the same city, to be holden before the mayor and aldermen of such city, to answer the plaintiff in the same plaint named, in the plea in such plaint specified; and such serjeant-at-mace, *&c.*, at such court whereat such plaint shall be levied or affirmed, shall by virtue of such precept testify by word of mouth to the same mayor and aldermen, that the defendant in the same plaint named had nothing within the liberty of the city aforesaid whereby he might be summoned, and then the same defendant at the same court shall make default; and thereupon in such court the plaintiff named in such plaint shall testify and allege by word of mouth, to the same mayor and aldermen, that some other person, for any cause whatsoever, is indebted to such defendant in any sum of money amounting to the debt in the plaint aforesaid specified or part thereof; then, on the petition of the plaintiff in the same plaint named, the same court shall command such serjeant-at-mace, *&c.*, that the same serjeant shall attach the defendant in such plaint named by such sum so being in the hands or custody of such other person, *&c.*, and defend such sum in his hands, so that the same defendant appear at the next court of the lord the King, in the Chamber of the Guildhall aforesaid, to be holden before the mayor and aldermen of the city aforesaid, *&c.*, to answer the same plaintiff in the same plea; and the same serjeant-at-mace, *&c.*, at such court, before the mayor and aldermen of the city aforesaid for the time being, shall testify that he did attach the same defendant by such sum in the hands and custody of such other person, and so defended such sum, so that the same defendant should appear at the same court to answer the same plaintiff in the same plaint named, in the plea in such plaint specified; and then such defendant, at that court, and at three other several courts of the lord the King then next following, to be holden before the mayor and aldermen of the city aforesaid for the time being, in the Chamber aforesaid, being solemnly required, shall not come but make default, the plaintiff in the same plaint named having appeared at every of such courts, then, at the last of such four courts,

such serjeant-at-mace, &c., shall be commanded to make known to such other person in whose hands and custody, &c., to appear at another court of the lord the King, to be holden in the Chamber of the Guildhall aforesaid before the mayor and aldermen of the city aforesaid for the time being, &c., to show if he has anything to say for himself or declare why the same plaintiff in such plaint named should not have execution against him for such sum so in his hands and custody attached and defended, &c.; and then at the same court appearing as well the plaintiff in the same plaint named as such other person forewarned, &c., in whose hands and custody, &c., such other person having acknowledged the sum so attached and defended to be due to the defendant in the same plaint payable to the same defendant at a certain day then next following, then at that court it shall be adjudged that such other person shall pay to the plaintiff in the same plaint named such sum of money so in his hands and custody attached, &c., at such day, in full payment of the debt in the said plaint specified [*according to the rate of the sum attached in his hands* (*b*)], or such parcel thereof as such sum shall amount to; and that such other person shall find sufficient mainpernors, sureties, or pledges to pay on that day to the plaintiff, &c., such sum, &c., and that after such surety found and execution obtained of such sum so in the hands and custody of such other person attached and defended by the plaintiff in the same plaint, such other person shall be discharged of the same sum against the defendant in the plaint aforesaid named; and in like manner the same defendant shall be discharged of so much of the sum of debt in the same plaint specified:* Whereby the aforesaid Roger ought not to have an action against the aforesaid John touching the debt aforesaid, as the same John saith, or otherwise as the aforesaid Roger saith: And because it appertains to you, by the Recorder of the city aforesaid, according to the custom of the same city from the time abovesaid used, to certify in this behalf, by word of mouth and not otherwise, the truth of the issue to be tried, and the custom aforesaid in that behalf certified: We command you that you certify and make appear to our justices at Westminster, on the octave of St. John the Baptist, whether there is and for the whole time abovesaid has been in the city aforesaid such custom as the aforesaid John Colyns hath in pleading alleged

(*b*) The words in italics are omitted in the Return.

or not. And have you there this writ. Witness, T. Bryan, at Westminster, the thirteenth day of June in the twenty-second year of our reign.

COPLEY.

Liber L, 176.

The Return of the Writ aforesaid, and the Custom aforesaid declared, &c.

IN the city of London, amongst other things, such is and from time whereof the memory of man is not to the contrary hath been a custom used and approved [*Here follows the custom, as set out in the writ between the asterisks*] against the plaintiff in the same plaint named. And further, if the defendant in the plaint aforesaid named, after such sureties or pledges to pay, *&c.*, at such day, *&c.*, and before the plaintiff in the same plaint named shall have execution of such sum of money so attached and defended, shall come in such court and then and there find sufficient mainpernors, sureties, or pledges to answer the plaintiff in the same plaint named, touching and concerning such plaint until the end of the plea of such plaint, according to the custom of the city aforesaid; that then, after such mainpernors, sureties, or pledges in form aforesaid found, such other person shall not be discharged of the same sum so attached and defended against the defendant in the plaint aforesaid named; nor shall the same defendant be discharged of such sum against the plaintiff in the same plaint specified, *&c.*, but pending any such attachment undetermined and undiscussed, and before execution thereupon obtained, such defendant in the same plaint named shall not maintain any action of debt against such other person for such sum of money so in his hands attached and defended, if such attachment by such other person shall be pleaded and alleged against the said defendant.

No. 3.

Record in Attachment, *temp.* Rich. II.

xv° die Novembris. Querela.

Attachiamentum factum super Ricardum Trice, civem et mercerum Londiniensem, ad sectam Ludovici Angwelli de Lukka mercatoris, in placito debiti super demandam lvj^{s}. Qui quidem Ricardus attachiatus est per unum cooperlectulum, unum tester, et unam celuram rubeam worstede embrowdered cum popyngeayes, pretii xl^{s}. appreciatos per sacramentum Thomæ Baldock et Johannis Vepour, upholders, et deliberatos parti querenti per plegium Bartholomei Dosan Lombard, et Petri Plente mercer, ad respondendum inde, vel de pretio si, &c.

No. 4.

Order of Court for Attachment.

11 May, 10 Edw. IV., 1471.

Item: Consideratum est per Curiam quod fiat isto die quedam billa originalis pro et in nomine Willielmi Taillor, aldermani, versus Georgium ducem Clarencie et Ricardum comitem Warwici, pro mille libris, &c., et quod fiat superinde attachiamentum omnium jocalium, &c., per ipsos nuper dicto Willielmo, pro eisdem mille libris, in plegio liberat', &c.; et quod illa jocalia, &c., appreciantur et vendantur, &c.

ADDITION AND CORRECTION.

Page 133, Bill of Proof; *add* "no second bill of proof can be filed without an affidavit of merits."

Page 77, note [m], second line from the bottom, for 475, *read* 418.

INDEX.

Printed by Arthur Taylor, 39, Coleman street.